83-856

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DORIA MINING and ENGINEERING CORPORATION,
a Corporation

Petitioner,

v.

JAMES G. WATT, Secretary of the Interior;
ROBERT S. BERLAND, Secretary of Agriculture;
ZANE G. SMITH, Regional Forester; and
ROBERT M. TYRREL, Supervisor,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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November 23, 1983

QUESTION PRESENTED

1. Is there any real difference between extrinsic fraud or intrinsic fraud when there is common law fraud perpetrated by a governmental agency, as a party, upon an administrative tribunal thus deceiving that tribunal and depriving the other party of its day in Court?

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Petitioner, Doria Mining and Engineering Corp. ("Doria"), a corporation, hereinafter referred to as "Petitioner", prays that a Writ of Certiorari issue to review the judgment and opinion of the

United States Court of Appeals for the Ninth Circuit in the above-entitled case.

The respondents herein are James G. Watt, Secretary of the Interior, now William Clark, Robert S. Berland, Secretary of Agriculture, Zane G. Smith, as Regional Director of the United States Forest Service, and Robert M. Tyrrel, as Acting Forest Supervisor of the San Bernardino National Forest (the "Federal Respondents), the Department of Transportation of the State of California ("Cal-Trans"), and Calnev Pipeline Company (Calnev). The federal respondents have a continued interest in the outcome of this case by reason of the intervention of the United States in the mining contest proceeding commenced by Cal-Trans, as more fully described below.

OPINIONS AND DECISIONS BELOW

The Opinion and Judgment of the

Court of Appeals for the Ninth Circuit, not published, appears in Appendix "A" of this Petition.

The Findings of Fact, Conclusions of Law and Judgment of the District Court for the Central District of California Granting the Defendants' Motion to Dismiss Plaintiff's Complaint pursuant to F.R.Civ.P. 41(b) appears in Appendix "D" of this Petition.

The Decision of the Administrative Law Judge appears in Appendix "B" of this Petition. This decision declared Doria's 18 unpatented placer mining claims null and void for lack of discoveries of valuable mineral deposits.

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was entered on August 25, 1983. This Petition for

Certiorari was filed within 90 days of said date.

The jurisdiction of this Court is found at 28 U.S.C. §1254(1).

STATUTES WHICH THE CASE INVOLVES

The General Mining Law of May 10, 1872, as amended, in particular 30 U.S.C. §§22 and 35, and the Surface Resources Act of July 23, 1955, in particular 30 U.S.C. §611, all as set forth in Appendix "E" hereof.

STATEMENT OF THE CASE

Since 1955 respondent Doria, or its predecessors, claimed possessory interests in eighteen placer mining claims located on federal lands in the Cajon Pass region of the San Bernardino National Forest, San Bernardino County, California.

On or about September 26, 1968,

the United States of America recorded a Highway Easement Deed to the State of California which granted to the State an easement over lands covered by the mining claims. Pursuant to such recorded easement, the State entered on portions of land covered by the mining claims and constructed the freeway commonly known as Interstate 15.

On or about January 1, 1961, and again on or about March 27, 1970, the United States Department of Agriculture, Forest Service, issued certain Special Use Permits to Calnev for the construction of pipelines across portions of such federal lands. In 1970, Calnev, pursuant to such Special Use Permits, entered upon and constructed high pressure pipelines across portions of the mining claims.

Both the easement deed granted to Cal-Trans and the Special Use Permits

granted to Calnev were subject to outstanding valid claims, if any, existing on the dates of the grants. Neither Cal-Trans nor Calnev obtained permission from Doria or any of its predecessors in interest to enter upon the property upon which the mining claims were located.

Based upon the entries by Cal-Trans and the federal respondents onto lands covered by the mining claims, on or about December 10, 1970, Doria filed suit in the Superior Court of the State of California for the County of San Bernardino, against Calnev for trespass and inverse condemnation in respect to the mining claims. On January 5, 1971, Doria filed a second suit in the Superior Court for San Bernardino County against Cal-Trans for trespass and inverse condemnation in respect to the mining claims. Those suits are still pending and, in fact, have been stayed pending the outcome

of this proceeding.

In 1972, the respondent, Cal-Trans, filed private contest No. R-4873 in the Department of the Interior pursuant to 43 C.F.R. §§4.450-1 et seq. asserting interests adverse to Doria in the lands on which the claims were located and alleging that the claims were invalid for failure to discover any valuable mineral deposits within the limits of the claims. Prior to the hearing on said contest, the United States intervened on the side of that respondent as a contestant. After a six-day hearing, all 18 claims were declared null and void by Administrative Law Judge Graydon Holt. Doria appealed the decision to the IBLA and on or about October 31, 1974, the IBLA affirmed the decision.

On March 12, 1975, Doria filed its Complaint in the United States District Court, Central District of Califor-

nia, for "Review of Decision Invalidating Mining Claims and For Declaratory Judgment of Validity and For Injunctive Relief," which proceeding was governed by 28 U.S.C. §1331(a).

On April 28, 1975, Petitioner and the Respondents moved for Summary Judgment and dismissal of Doria's Complaint on the grounds that the entire administrative record in Contest No. R-4873 supported the IBLA decision declaring Doria's mining claims invalid and that moving parties were entitled as a matter of law to have judgment entered affirming the IBLA decision.

After the motion was argued, and submitted for decision, Doria filed, on April 26, 1976, a Motion for Leave to Amend its Complaint on the grounds of Doria's "recent discovery," on or about April 1, 1976, that the agency decision was "based on perjured and false testi-

mony" allegedly adduced by the respondents in the contest hearing. The Affidavits and Memorandum in support of the Motion averred that exhibits in evidence at the hearing showing results of tests run on samples taken from Doria's claims "substantially vary and differ from the actual test sheets prepared by the State laboratory;" that said exhibits materially distorted the actual test results and that the State laboratory, in conducting the tests on the samples, "failed to comply with standard procedures established by the State for all material testing laboratories." Doria allegedly discovered this asserted misconduct after obtaining copies of all the test sheets showing results of tests run on material from the Doria claims. The proposed amended complaint generally alleged the discovery of "new evidence" which showed that evidence presented by Petitioners

at the hearing was "inaccurate, misleading and false and misrepresented the true facts" and that the IBLA decision was "based on erroneous and false facts and information knowingly introduced into said hearing by defendants."

Thereafter, the District Court filed its Memorandum of Decision granting Defendants' Motion for Summary Judgment and entered summary judgment affirming the IBLA decision. From said judgment Doria appealed and the Court of Appeals rendered its Opinion vacating the summary judgment and remanding to the District Court. The Court held that the District Court may consider evidence outside the administrative record in determining whether allegations of a fraud on the agency are meritorious, and remanded for further proceedings, including consideration of the merits of Doria's motion. This opinion is reported at 608 F.2d 1255 (9th Cir.

1979) and is annexed hereto as Appendix "E". This Court denied certiorari at 445 U.S. 962 (1980).

The trial in the District Court proved the fraud perpetrated by Cal-Trans and the federal respondents. The witnesses were the employees of the State laboratory and G. Austin Schroter (Schroter), the expert witness for the State. Each of these witnesses were examined on direct examination as adverse witnesses. Their testimony and the documentary evidence established that:

a) the bags of material from the Doria sites gathered by Schroter were insufficient in weight and quality and, therefore, non-representative;

b) because of these facts, the State laboratory was compelled to augment its test procedures illegally in that it destroyed the side of the test sheets which record the data revealed by the

testing and, more particularly, the weight and size of the samples;

c) since the samples did not weigh enough to perform individual tests, they had to be combined or composited; however, that process is illegal when it is performed on material from more than one claim site and, furthermore, it only yields an average result and does not adequately test the individual sample, e.g., the individual sample from one claim site showed a successful result for the Los Angeles Rattler Test (L.A.R.T.)* while the composite sample showed an inadequate result;

d) the samples delivered to the State laboratory did not contain the rocks, cobbles and boulders that were

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*This test consists of a drum with steel balls which strikes the material during 500 revolutions of the drum in order to test its durability because it will become a component part of a highway.

typically situate on all the claim sites - these materials must be tested according to the test methods promulgated by Cal-Trans, which method sets forth the weight required of each sample before it is tested;

e) the test sheets show compositing of nine samples at a time and the material is discarded after such tests are completed. However, there were individual tests reported by the State laboratory. The absurdity of this revelation lies in the fact that there can be no individual testing if there is no material left upon which to perform these tests;

f) the original test cards are retained for one year, which is the alleged policy of the State laboratory. The laboratory supervisor testified that he had seen written proof of that policy for fifteen years in the State laboratory. The Court directed him to produce that written

proof at the next session of trial. At that next session, the witness,the supervisor at the State laboratory, testified that he had obtained such written proof from Robert Vidor, counsel for Cal-Trans, in the office of the Assistant United States Attorney representing the federal respondents, on the day before that session. The written proof if shown as Appendix "C". It bears the date of April 2, 1980. The record disposition schedule has an alteration consisting of the words "includes work cards and tests" which words are written into the category "Sample Identification Cards," which is a one-year retention period. The category "Work Cards and Test Reports" appears at the bottom of the schedule and the retention period for that category is active for two years. There is also a category "Summary of Tests" which is a five-year retention period. It is patent that the

proof of such policy is not fifteen years old and that the alteration was done by Mr. Vidor while the document was in his possession in order to corroborate the prior testimony of the witness. Two very important facts substantiate this contention. One is that one Lorraine Haglund, the custodian of the Records Disposition Schedule in Sacramento, testified that the same schedule in the Records Management Handbook, which was before her at the time, bears NO writing on it. Secondly, Mr. Vidor, called as a witness at the time of the trial, testified that when he obtained custody of the schedule, it had no writing on it. He further swore that when he gave it back to the witness, it contained the writing on it. The District Court Judge did not perceive the meaning of this proof. In fact, he studiously refused throughout the trial to accept the fraud of Cal-Trans, Mr. Vidor

and the federal respondents. Petitioner cannot conceive of a more blatant example of fraud and deceit than this sequence of proof. It is done to perpetrate the perfidy and to disguise the truth. All that petitioner desires is that the trial below continue with the respondents' case. The petitioner's case should never have been dismissed. It was clearly erroneous to do so. The foregoing proof should convince this Court of that fact.

g) the witness for Cal-Trans, Schroter, performed improper sampling in the field, consisting of gathering samples insufficient in weight and of the true quality of the claim sites. This effort was deliberate. He was a paid hack. He testified to the delivery of rock samples to the State laboratory. However, the witness, who performed the testing, testified that he never received rock samples for testing and that is why

compositing was performed. Schroter tested material from the wrong claims and included that in his results. Schroter's field notes of weights are wholly discrepant with affidavits of Mr. Vidor and other employees of Cal-Trans in that the true weights of the material never approached the weights recorded in the State laboratory. With these facts in mind, Schroter prepares his sterile report and Mr. Vidor offers it into evidence at Contest R-4873 as the embodiment of the truth. That report is shown herein as Appendix G. It is apocryphal that the report is silent on the weights and quality of the material, testing the wrong claim, compositing because of insufficient weight, and the lack of individual tests because there was no material left. Administrative proceedings at that time did not permit pre-hearing discovery. The witnesses at the trial did not testify

at that hearing and the test sheets and records disposition schedule were withheld from introduction into evidence at the hearing. The only exhibit introduced by Cal-Trans to show the test results was Schroter's two-page report. Those results were ill-conceived and that is why their foundation was withheld from the Administrative Law Judge.

REASONS FOR GRANTING THE PETITION

The overwhelming reason for granting this petition is to prevent the perfidy of Cal-Trans and its counsel from confiscating the property of the Petitioner. That is strong language; however, at this point, the Petitioner cannot afford to be meek. This is a case of missing test sheets and altered test sheets from the Records Management Handbook of Cal-Trans. This is a case of blatantly

improper and illegal testing of material by the laboratory owned and operated by Cal-Trans - testing which runs completely afoul of the test methods promulgated by Cal-Trans. It is such fabric of fraud which this Court considered in Hazel-Atlas Co. v. Hartford Co., 322 U.S. 238, 88 L.E. 1250, 64 Sup.Ct. 997 (1943).

Therein, Mr. Justice Black, at p. 245 et seq., stated:

> "Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments. This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals. Cf. Marshall v. Holmes, supra. Proof of the scheme, and of its complete success up to date, is conclusive. Cf. United States v. Throckmorton, supra."

This Court did not distinguish

between extrinsic and intrinsic fraud in Hazel-Atlas. However, a reading of the first opinion in the Court of Appeals (Appendix "A") in this case shows that the Court relied upon Hazel-Atlas as the primogenitor of the "rule" that only extrinsic fraud can form the basis of relief in this case and concluded that there was none, basing its opinion on only one aspect of the appellant's argument. In fact, at oral argument in the Court of Appeals, in response to a question by Chief Judge Wallace whether there is extrinsic or intrinsic fraud in this case, petitioner's counsel answered that there is no need to differentiate between the two. This Court has so held.

One learned commentator, a renowned authority on federal practice, has stated:

> "As generally stated, intrinsic fraud, such as perjury (including false pleadings or forged documentary testimony) will not lay a foundation for an original action

under the Throckmorton doctrine. Doubt was, however, cast upon this doctrine by the Court's language, if not its holding, in Marshall v. Holmes, decided some thirteen years after Throckmorton. The Court's language in Marshall puts the basis for relief upon the following very general terms:

"While, as a general rule, a defense cannot be set up in equity which has been fully and fairly tried at law, and although, in view of the large powers now exercised by courts of law over their judgments, a court of the United States, sitting in equity, will not assume to control such judgments for the purpose simply of giving a new trial, it is the settled doctrine that 'any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself at law, but was prevented by fraud or accident, un-mixed with any fault of negligence in himself or his agents, will justify an application to a court of chancery.' Marine Ins. Co. v. Hodgson [§60.36, supra, n 2][27]

"[27] Marshall v. Holmes (1891), 141 US 589, 596, 12 S Ct 62, 35 L ed 870."

The commentary proceeds:

"Shortly thereafter, this Court refused to resolve the asserted conflict,[28] and more recently in

the Hazel-Atlas case did not find it necessary to distinguish between extrinsic and intrinsic fraud where the issue was relief from a judgment because of fraud perpetrated upon the court which rendered the judgment.

"[28] In Graver v. Faurot (CC ND Ill 1894), 64 F 241, rev'd (CCA 7th 1896), 76 F. 257, cert. dism'd (1896), 162 US 435, 16 S Ct 799, 40 L ed 1030, the court, feeling the United States v. Throckmorton and Marshall v. Holmes were in direct conflict and not knowing which was to govern, sent the case to the Supreme Court on a certificate of importance. The Supreme Court refused to hear the merits, disposing of the case on a technicality as to the validity of the use of a certificate of importance."

The commentary continues:

"The Supreme Court of the United States, to show its utter impartiality, has ruled both ways, and left the spectacle of two cases, one of which holds that false evidence is a ground for reversal [Marshall], the other that it is not [Throckmorton], both of which has ever been overruled. In fact, when a Circuit Court, somewhat puzzled as to which of the two authorities it would follow, asked for enlightenment, the Supreme Court refused to commit itself by answering [see n 28, supra].

. . .

"As for the federal rule itself, it must still remain unsettled. Since the courts are at liberty to cite either line of authorities, and do so as suits their convenience, the only possible answer in spite of repeated assertions that the federal rule is clear, is that there is no federal rule at all. And there will be none until one or the other of the conflicting decisions is overruled.[30]

"[30](1921) 21 Col L Rev 268, approving the Throckmorton rule if liberally applied."

The commentary then concludes:

"The Third Circuit, in Publicker v. Shallcross, while careful to stress factors that would warrant relief under the extrinsic doctrine of Throckmorton, did, however, state that 'we do not believe it [Throckmorton] is the law of the Supreme Court today,' and

'In our judgment, and if the case arises, the harsh rule of United States v. Throckmorton...will be modified in accordance with the more salutary doctrine of Marshall v. Holmes...We believe truth is more important than the trouble it takes to get it.'[31]

"[31]Publicker v. Shallcross (CCA 3d, 1939) 106 F 2d 949, 950, 952, 126 ALR 386, cert den (1940) 308 US 624, 60 S Ct 379, 84 L ed 521. In this case the court held that an order approving a compromise of a large

> claim held by a receiver against S for one cent on the dollar could be set aside after a lapse of two years where X had perjuriously concealed large assets and his true financial condition. Factors which the court stressed to take the case out of Throckmorton were: the receiver, in charge of collecting the assets of the insolvent company, was an officer of the court; at the hearing on the offer of compromise the receiver did not treat X as an adversary but assumed the role of an advocate for X's offer; a private litigant is working for himself and is apt to make a greater effort to discover perjury than a person such as a receiver; and the court itself has an interest in ascertaining the truth on behalf of the creditors and others, and X's perjury not only misled the receiver but impinged directly upon the administration of justice."

7 J. Moore Federal Practice, paragraph 60.37 [1] (2d Ed. 1979), at pp. 615-617. See also SAE Contractors, Inc. v. United States, 406 U.S. 1, 15, 31 L.Ed.2d 658, 92 Sup.Ct. 1411 (1971).

Based upon these principles alone, we have a situation wherein "a federal court of appeals...has decided a federal

question in a way in conflict with applicable decisions of this Court" or "has decided an important question of federal law which has not been, but should be, settled by this Court." Rules of the Supreme Court, Rule 17(a)2(c). However, we have much more.

We have in this case a colossal fraud perpetrated by Cal-Trans and its counsel, the gravity of which was contemplated by this Court when it said:

> "This matter does not concern only private parties. There are issues of great moment to the public in a patent suit. Mercoid Corporation v. Mid-Continent Investment Co., 320 U.S. 661; Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488. Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait

> upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."

Hazel-Atlas Co., ibid, at p. 246.

However, as fraudulent judgments in the criminal law are confiscatory of personal liberty, so too in the case sub judice, a fraudulent judgment is confiscatory of Doria's property. Those decisions commence with Communist Party v. Subversive Activities Control Board, 351 U.S. 115, 100 L.Ed. 1003, 76 S.Ct. 663 (1956). This Court, at pp. 124-125, stated:

> "The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See McNabb v. United States, 318 U.S. 332. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only

> irrational or perverse claims of its disregard can be asserted... We cannot pass upon a record containing such challenged testimony. We find it necessary to dispose of the case on the grounds we do, not in order to avoid a constitutional adjudication but because the fair administration of justice requires it."

In Mesarosh v. United States, 352 U.S. 1, 1 L.Ed.2d 1, 77 Sup.Ct. 8 (1956), at p. 14, it was said:

> "This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. [Citing McNabb, supra, in a footnote.] If it has any duty to perform in this regard it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity."

Both decisions and the aforesaid quotations, therefore, are found in United States v. Shotwell Mfg. Co., 355 U.S. 233, 2 L.Ed.2d 234, 78 Sup.Ct. 245 (1957) wherein this Court found that newly discovered evidence which contraverted the crucial issue in the case viz., timely

and bona fide disclosure of wrongdoing to the Treasury, warranted a remand to the District Court for further proceedings consistent with the opinions.

An excerpt from a lower court decision entitled Bulloch v. United States, 95 F.R.D. 123, 144 (D.C. Utah, 1982), creates a startling analogy:

> "Fraud upon the court is a nebulous concept, Wilkin v. Sunbeam Corporation, 466 F.2d 714 (10th Cir. 1972). It of course need not fall neatly into a pattern of common law or securities fraud, nor be accomplished by any single means or in any particular way for, as in the instance of other similar concepts, precise definition should not supply to transgressors a convenient map for avoidance. But it is that species of fraud which does, or attempts to, defile the court itself or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its important task of adjudicating cases that are presented for adjudication. Hazel-Atlas Co. v. Hartford Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944). See also 7 Moore's Federal Practice (2d ed.) §60.33 at 515. Both Moore,

Id. at 512-13, and Wilken[13] at 717, suggest that Hazel-Atlas expanded the traditional fraud on court concept. The defendant has cited cases, including Wilkin, to emphasize the strong public policy supporting the finality of judgments and indicating that even perjury, false answers to interrogatories, or new evidence in and of themselves will not warrant their being set aside in ordinary circumstances. I do not regard any of them as persuasive against plaintiffs' contentions in the virtually unprecedented circumstances shown by the present record and believe that they must yield here to broad application of principles to be gathered from Hazel-Atlas.

"[13] In Wilkin the claims of fraud upon the court were rejected on the grounds that documents in question had been held by the district court to be irrelevant and immaterial to the issues and the lawyers statements complained of depended upon a credibility issue which the trial court resolved against the plaintiff.

"The present is not an ordinary case with mere private or even ordinary public concerns. It originated amid a transcendent chapter of world history, developing but imperfect information

concerning a mysterious and awesome device as to which the AEC and those associated with it enjoyed a virtual monopoly of knowledge in comparison to that independently available to the plaintiff sheep owners, their attorneys and indeed, the Court, and a variated and persistent program of government representatives to disclose only selectively the information fairly necessary in the prospective judicial proceedings.

"In such a setting it appears by clear and convincing evidence, much of it documented, that representations made as the result of the conduct of government agents acting in the course of their employment were intentionally false or deceptive; that improper but successful attempts to pressure witnesses not to testify as to their real opinions, or to unduly discount their qualifications and opinions were applied; that a vital report was intentionally withheld and information in another report was presented in such a manner as to be deceitful, misleading, or only half true; that interrogatories were deceptively answered; that there was deliberate concealment of significant facts with reference to the possible effects of radiation upon the plaintiffs' sheep; and that by those convoluted actions and in related ways the processes of the court were manipulated to the improper and unacceptable advantage of the defendant at the trial."

The petitioner respectfully submits that the conduct of Cal-Trans, its counsel and the federal respondents is analogous to "these convoluted actions and in related ways the processes of the [Administrative Tribunal] were manipulated to the improper and unacceptable advantage of the [prevailing parties] at the trial." Bullock, ibid, p. 144.

The prominent factor in this case is that we have counsel in perfidy. The perfidy perpetuates the fraud. The test sheets are absent at R-4873. When the case is tried in the District Court, the critical information as to weights and representativeness is gone. The test methods of Cal-Trans are violated in toto. Then the document destruction records of Cal-Trans are altered when they are in the custody of its counsel. The "expert" of Cal-Trans is active in the commission of fraud when he tests the wrong claims.

The act of compositing the material is contrary to law and testimony concerning it is false because compositing destroys the material. Compositing cannot be used in non-representative samples.

As to counsel, Prof. Moore says it well:

> "One point of difference, although not stressed by the Court in Hazel-Atlas, is that an attorney of Hartford was implicated in perpetrating the fraud. We believe that this is important, for an attorney is an officer of the court. While he should represent his client with singular loyalty, that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary, his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case, he perpetrates a fraud upon the court.[51]"

"[51] Sutter v. Easterly (1945) 354 Mo 282, 189 SW2d, 162 ALR 437.

7 J. Moore Federal Practice, paragraph 60.33, at p. 513.

Two further observations are

critical.

Firstly, the Court of Appeals in its first Doria opinion at 608 F.2d 1255, did not differentiate between extrinsic or intrinsic fraud in remanding the case for trial. Hazel-Atlas does not appear in that opinion. One conclusion can be drawn viz., that at that time there were sufficient allegations of fraud to compel remand. Those allegations have now been proven and the lower Courts have disregarded that proof in dismissing the complaint while saving the respondents from presenting their case.

The Court of Appeals in that opinion had cited Interstate Investors, Inc. v. United States, 287 F.Supp. 374, 382-4 (S.D.N.Y. 1968) as authority for the proposition that "a court reviewing an administrative determination may properly exercise its discretion to hear an issue of fraud not presented before the administra-

tive body, and hence not found in the administrative record." A reading of that case shows that Hazel-Atlas is cited as authority for the foregoing proposition and Interstate was affirmed by this Court at 393 U.S. 479 (1969). However, the same Court has acted otherwise in this phase of the case.

The present Court of Appeals opinion becomes all the more incredulous and inconsistent with this Court's applicable decision in Hazel-Atlas when we read that in its prior opinion, fraud in any form was sufficient to compel remand:

> "Although the circumstances of Montedison are not identical to those of this case, the rationale of that case - that in certain circumstances a court reviewing an administrative decision should hear new allegations of fraud based on evidence extrinsic to the record in order to prevent injustice - is equally applicable here. Newly discovered evidence of fraud and perjury in an administrative proceeding will not be found in the administrative record. If the reviewing court, in

> the face of an allegation that such evidence exists and that administrative remedies have been exhausted, nevertheless confines itself to consideration only of evidence in the record, the party seeking review is left without any forum in which to argue the allegedly fraudulent basis of the administrative judgment. This is precisely what happened to Doria. We conclude that the importance of preventing the prejudice to Doria and similarly situated parties which arises out of circumstances such as those before us outweighs any countervailing interests which administrative agencies and other parties which appear before them may have in the finality of agency decisions."

608 F.2d 1255, 58.

Thus, we have no discussion of niceties such as extrinsic or intrinsic fraud - only "fraud and perjury in an administrative hearing." That is what the petitioner proved below. The Court of Appeals is now changing its definitions in contravention of the principles of law enunciated in Hazel-Atlas.

The same Court of Appeals, in Green v. Ancora-Citronelle Corporation,

577 F.2d 1380 (1978), stated:

> "In order to be considered extrinsic fraud, the alleged fraud must be such that it prevents a party from having an opportunity to present his claim or defense in court, Kulchar v. Kulchar, supra; Kachig v. Boothe, supra, or deprives a party of his right to a 'day in court', Pentz v. Kuppinger, 31 Cal. App. 3d 590, 595, 107 Cal. Rptr. 540, 543 (1973); Robinson v. Robinson, 198 Cal. App. 2d 193, 17 Cal. Rpt. 786, 788 (1961)."

Was not Doria deprived of a day in Court? It is respectfully submitted that this entire petition is replete with facts substantiating an affirmative answer to this question.

Secondly, the fraud is so blatant here that this Court has the special and important reasons for the exercise of its discretion in favor of granting the petition. Rule 17.1(a), Rules of the Supreme Court.

CONCLUSION

> "An aggrieved party's attack on an agency decision based on matters extrinsic to the administrative record, but intrinsic to the hearing, such as alleged perjured testimony, does not ipso facto require an inquiry into the merits of the charges. The Court should determine from a review of the entire record whether the alleged tainted evidence went to the core of the agency decision. If, as in the instant case, it did not and the decision is otherwise well supported by substantial evidence, continued litigation is needless and constitutes an unwarranted burden on the courts."

This is the conclusion of the federal respondents at page 19 of their petition for a writ of certiorari to the Ninth Circuit filed in this Court on January 22, 1980. It is set forth herein because the Court of Appeals obviously felt that the "tainted evidence went to the core of the agency decision" and, therefore, it did permit an inquiry into the merits of the charges herein. That inquiry is now com-

pleted. That inquiry is replete with circumstances of fraud and illegality. This case cries out for Supreme Court review.

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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November 23, 1983

APPENDIX A

Not for Publication

F I L E D
AUG 25 1983
PHILLIP B. WINBERRY
Clerk, U.S. Court
of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DORIA MINING AND ENGINEERING CORPORATION, a corporation,	No. 82-6005
Plaintiff-Appellant,	D.C. No. CV 75-889-FW
-vs-	
JAMES G. WATT, Secretary of the Interior; ROBERT S. BERGLAND, Secretary of Agriculture; JANE G. SMITH, Regional Forester; and ROBERT M. TYRREL, Supervisor,	MEMORANDUM
Defendants-Appellees.	

Appeal from the United States District Court for the Central District of California
Francis C. Whelan, District Judge, Presiding
Argued and Submitted August 9, 1983

BEFORE: TRASK and WALLACE, Circuit Judges,

and SOLOMON,* District Judge.

In the first appeal of this case, Doria Mining & Engineering Corp. v. Morton, 608 F.2d 1255 (9th Cir. 1979), we held that the district court had jurisdiction to allow evidence outside the record to consider Doria's claim that the IBLA decision was obtained by fraud. We vacated and remanded because the district judge concluded he had no jurisdiction to allow such evidence or to consider such a charge. Our holding went no further.

On remand, the district court allowed Doria to attempt to prove extrinsic fraud. The proof was largely that the testimony of expert witness Schroter was false. This, however, would be an allegation of intrinsic -- not extrinsic

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* Honorable Gus J. Solomon, United States District Judge, District of Oregon, sitting by designation.

-- fraud. See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 261 n.18 (1944); Wood v. McEwen, 644 F.2d 797, 801 (9th Cir. 1981). The only issue of extrinsic fraud before us is whether the test cards, which were not produced by the government at the ALJ proceeding and allegedly not discoverable by Doria, establish a fraud on the ALJ tribunal which prevented Doria from presenting its claim in court. The district court was more than patient in allowing Doria to put on its case. No one contests before us whether the district court erred in allowing the evidence. We, therefore, do not reach that issue.

The district court found no extrinsic fraud. The parties agree that this determination should be reviewed by us based upon the clearly erroneous test. See Rite-Nail Packing Co. v. Berryfast, Inc., 706 F.2d 933, 937 (9th Cir. 1983);

Maykuth v. Adolph Coors Co., 690 F.2d 689, 695 (9th Cir. 1982). We conclude that the district judge was not clearly erroneous.

Since the district judge found no extrinsic fraud, he reinstated his earlier conclusion that there was substantial evidence in the record to support the decision of the IBLA. We agree with the district judge.

AFFIRMED.

APPENDIX B

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS
HEARINGS DIVISION
Room W-2426, 2800 Cottage Way
Sacramento, California 95825

December 26, 1973

DECISION

The People of the State of California, acting by and through the Department of Public Works, and Calnev Pipe Line Company, a Corp., Contestants	:	Contest No. R-4873
	:	Involving Sand Bank, Harbor, Many Stones, Wild Trail, Buck Shot, Old Sunny, Outlook, Delight, Sunshine, Baldy, Hawk, Old Blister, Clear View, Buster, Lizard Gulch, Mesquite, Barren, and Rattler mining claims, located in Secs. 14 and 23, T. 3 N., R. 6 W., S.B.M., San Bernardino County, California
v.	:	
Doria Mining and Engineering Corporation, a Corp., Richard H. Hutchison, J. J. Schwietert and E. May Schwietert, Contestees	:	
United States of America, Intervenor	:	

Preface

The eighteen 40-acre association mining

claims were located between March 1, 1985 and July 12, 1955. They are in the Cajon Pass approximately half way between Victorville and San Bernardino and within the San Bernardino National Forest. On January 1, 1961 and March 27, 1970, Special Use Permits were issued to the Calnev Pipe Line Company for the construction of two pipelines across the claims, and on September 26, 1968, the State of California was issued a Highway Easement Deed across the claims. All such permits and easements are subject to "valid" existing rights. This proceeding was initiated by the State and Calnev to determine whether the mining claims constituted valid existing rights through a complaint dated July 12, 1972. In the complaint the contestants alleged:

> (a) There is not disclosed within the boundaries of said mining claims, and each of them, mineral materials of a variety subject to the mining

> laws sufficient in quantity, quality and value to constitute a discovery;
>
> (b) The materials found within said mining claims, and each of them, could not have been mined, removed and marketed at a profit prior to the Act of July 23, 1955; and
>
> (c) The land embraced within said mining claims, and each of them, is nonmineral in character.

If there has been a discovery of a valuable mineral deposit, the land must necessarily be mineral in character. If there has not been such a discovery on a claim, the claim is void. Although each 10-acre subdivision must be mineral in character, the determination in this case will be based on the question of discovery not on the mineral character of the land. Accordingly, the third charge is dismissed.

The contestees filed an answer denying the charge of lack of discovery and a

hearing to determine this issue resulted. The hearing was held in Los Angeles, California, beginning on April 26, 1973. The State was represented by Robert W. Vidor, Esq., and by Ray M. Steele, Esq., Legal Division, Department of Public Works, Los Angeles, California. Calnev was represented by David G. Moore, Esq., of Reid, Babbage & Coil, Attorneys at Law, Riverside, California. The Government was represented by Charles F. Lawrence, Esq., Office of the General Counsel, U. S. Department of Agriculture, San Francisco, California. The contestees were represented by Milnor E. Gleaves, Esq., Los Angeles, California.

The witnesses called by the contestants were G. Austin Schroter, a consulting geologist and mining engineer; George Thwang, Jr., a retured business man who had been in the sand and gravel business

in Southern California for many years; Edward J. Curtin, manager of a sand and gravel business; and Robert E. Hove, the owner of a ready-mix concrete and aggregate business. The witnesses called by the contestees were William T. Hamling, a mining engineer employed by The Hazen Research, Inc.; John J. Schwietert, one of the contestees; David D. Billings, a glass technologist; Ralph P. Meyertons, a mining and metallurgical engineer employed by The Hazen Research, Inc.; James M. Muir, one of the contestees; Dr. Richard Hutchinson, a dentist and one of the contestees; and J. Mark Longfield, a consultant in the aggregate business.

The parties outlined the mining laws and various decisions setting forth the rules and guidelines to aid in determining the issue in documents and briefs filed both

before and after the hearing. These laws and guidelines will be set forth here only briefly to the extent necessary for an understanding of the decision.

Applicable Law

Many sand and gravel deposits on public lands have been the subject of consideration by the Department and the Courts. Recently the Interior Board of Land Appeals summarized the law of discovery in United States v. Clear Gravel Enterprises, Inc., 2 IBLA 285 (1971). This decision related to two sand and gravel claims located seven miles southwest of Las Vegas. The Board stated:

> The basic principles of law applicable to this case are now well-established and need no extensive elaboration. For a mining claim to be valid there must be discovered on the claim a valuable mineral deposit. A discovery exists
>
> > [W]here minerals have been found and the evidence is of such a character that a

> person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine . . . Castle v. Womble, 19 L.D. 455, 457 (1894); United States v. Coleman, 390 U.S. 599 (1968).

This test, the prudent man rule, has been refined to require a showing that the mineral in question can be extracted, removed, and presently marketed at a profit, the so-called marketability test. United States v. Coleman, supra. This present marketability can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand. The marketability test has been specifically held to be applicable in determining the validity of sand and gravel claims in the Las Vegas area. Palmer v. Dredge Corporation, supra note 3; 1/ Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959); Osborne v. Hammitt, Civil No. 414 (D. Nev., August 19, 1964).

1/ The Dredge Corporation, Inc., A-27970 (Dec. 29, 1959), aff'd Palmer v. Dredge Corporation, 398, F. 2d 791 (9th Cir. 1968), cert. denied, 393 U.S. 1066 (1969).

> Furthermore, since Congress withdrew common varieties of sand and gravel from location under the mining laws on July 23, 1955 (30 U.S.C. § 611 (1964)), it is incumbent upon one who located a claim prior to that date for a common variety of sand and gravel to show that all the requirements for a discovery, including a showing that the materials could have been extracted, removed, and marketed at a profit, had been met by that date. Palmer v. Dredge Corporation, supra note 3; United States v. Barrows, 404 F.2d 749 (9th Cir. 1968), cert. denied, 394 U.S. 974 (1960).

In the decision the Board included a lengthy quotation from Osborne v. Hammitt, supra. In that case the Court found that one hundred thousand acres of land in the Las Vegas Valley had been located as mining claims and that only one or two percent of the sand and gravel on this acreage could be marketed in the foreseeable future. The Court then stated:

> We do not discount the value of opinion evidence from qualified witnesses in cases dealing with fairly unique deposits of locatable minerals. This case is different. Sand and gravel of

> the same general quality found in the Bradford Claims is readily available in thousands of adjoining acres. The burden of the proponent, plaintiffs here, is not simply to preponderate in the evidence produced, its burden is to produce a preponderance of credible evidence, and the trier of fact is not required to believe or to give weight to testimony which is inherently incredible. It is apparent from the evidence that if, in June 1952, owners of other claims near Las Vegas had commenced to produce and market sand and gravel from their properties, such action would have filled the theoretical void in the supply of material to the Las Vegas market, rendering the Bradford Claims valueless. The plaintiffs failed to enter the race to supply the theoretical insufficiency of production of sand and gravel. If they had done so successfully, they would have satisfied the requirements of Foster v. Seaton (supra) by proving bona fides of development and present demand. Their failure so to act contradicts the speculative, hypothetical and theoretical testimony on which they rely.

Another ruling which will have a bearing on the determination in the present case was made in United States v. Barrows, 76

I.D. 299 (1959),[2/] which involved a sand and gravel claim located a few miles west of the eighteen clains in issue. The Department held that "material suitable only for fill purposes or for road base or for comparable uses has never been locatable under the mining laws, and, even if the material is suitable for other purposes, the sale of material for the uses just enumerated cannot be considered in determining its marketability." See United States v. William M. Hinde et al., A-30634 (July 9, 1968), and cases cited. In the Hinde decision the Department stated:

> The record is clear that up to July 23, 1955, only a miniscule amount of sand and gravel had been sold for other than fill or other purposes for which pit run material can be used 5/ and the sales had been for only a few dollars. The scanty returns

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2/ Approved in Esther Barrows v. Walter J. Hichel, 447 F. 2nd 80 (9th Cir. 1971).

> would have discouraged, rather than justified, any prudent man in spending his labor and money in attempting to develop a paying mine.

Footnote 5 above describes pit run material as:

> that which is simply taken from the claims and used elsewhere as it is without any processing, crushing, or washing. For "surfacing," for example, it is simply spread directly on the ground.

In a later case, United States v. J. L. Block, 12 IBLA 393 (August 28, 1973) the Board held:

> The Act of May 10, 1872, 17 Stat. 91, 30 U.S.C. § 23 (1970), provides in part that 'no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.' The Act of March 3, 1891, 26 Stat. 1097, 30 U.S.C. § 35 (1970), provides in part that '[c]laims usually called 'placer' * * * shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims * * *.'
>
> Where, as here, a mineral claimant or his predecessor in inter-

> est has located a group of claims, he must show a discovery on each claim located to satisfy the requirements of the mining laws. United States v. Bunkowski, 5 IBLA 102, 79 I.D. 43 (1972). It is not enough to offer evidence for the claims as a unit. United States v. Chas. Pfizer & Co., Inc., 76 I.D. 331 (1960).
>
> While we recognize the difference between the terms 'location' and 'mining claim,' and that the terms are used interchangeably the mining laws clearly require that a discovery is essential for each location. 30 U.S.C. § 23 (1970) and 30 U.S.C. § 35 (1970); United States v. Bunkowski, supra; Steele v. Tanana Mines R. Co., 148 F. 678 (9th Cir. 1906); Unita Tunnel, Min. & Transp. Co. v. Ajax Gold Min. Co., 141 F. 563 (8th Cir. 1905); Lindley on Mines, 3d Ed., §§ 437, 438. The discovery of mineral on one claim will not support rights to another claim or group of claims even though the claims are contiguous. Ranchers Exploration & Development Co. v. Anaconda Co., 248 F. Supp. 708 (D.C. Utah 1965).

In United States v. New Jersey Zinc Company, 74 I.D. 191 (1967) the Department held that the technology of a proposed

milling process must be determined from actual experiments with the average grade of ore. And in United States v. Silverton Mining and Milling Co., 1 IBLA 15 (1970) it was held that a locatable mineral must support a discovery on its own without assistance from the economic value of a non-locatable material.

Summary of Testimony and Findings

There was a substantial volume of testimony at the hearing but the facts upon which the decision will be based are relatively simple. The claims were originally located for alluvium for use as sand and gravel. There is a large deposit of the material on the claims and it extends along the freeway through Cajon Pass for seven to ten miles (Ex. 11). During the periods from 1953-1955 and from 1969-1972 the State realigned the freeway across the claims. In the latter

period material of a similar nature was processed in a portable plant on an adjoining section (Ex. 26) and used on the freeway. The contestees conducted a number of tests through the years and performed assessment work but made no attempt to market any material from the claims. In early 1973 the contestees employed The Hazen Research, Inc., a mining exploration and consulting organization, to investigate the claims to determine what minerals could be produced from the materials on the claims. The conclusion in The Hazen Report (Ex. B) is that the sand and gravel can be used in aggregates and that the feldspathic sand in the fines can be used in the manufacturing of glass. In addition the contestees mentioned gold, silver, platinum, and mica. After the contestants presented assay certificates showing insignificant values in gold and silver, and no values in platinum, they

did not pursue these materials. Also The Hazen report states that dark mica concentrate in the feldspathic sand is being evaluated for roofing mica, but again there was little or no evidence on this material.

Thus the issue of discovery evolves to the questions of whether there was a discovery of a valuable sand and gravel deposit on each claim as of July 23, 1955, and if not whether there was a discovery of a valuable deposit of feldspathic sand usable for glass manufacturing as of 1973. The parties agreed that the alluvium material was a common variety (Tr. 145).

The contestants' case on sand and gravel as of 1955 was to the effect that the material was tested and that it did not meet the specifications required for aggregate. Their witnesses recited the

fact that there was a substantial quantity on the claims and along the highway, that the material from the claims had not been used during the realignment of the highway during the 1953-1955 or the 1969-1972 periods, and they testified that at four cents a ton mile the material on the claims could not compete with better material located closer to the Victorville or San Bernardino markets. The contestees' case on this question was that the State Highway Department had authorized the use of the material on an adjoining section after being processed in a portable plant, that the material on the claims is similar, and that the material on the claims could have been processed and used in the same manner. Also there was evidence that there was ample water available.

The use of material on the claims as of

July 1955 for aggregate required a plant of some other means of screening, washing, and grading. Although there was water, it had not been developed, there was no processing plant, and the only potential market was the State of California. The State constructed roads across the claims during two periods but used material from a different area. This falls far short of establishing that there was a market for the sand and gravel on any one of the claims or on the claims as a group on the date that common varieties of sand and gravel were excluded from location. Accordingly, all the claims listed in the caption are declared null and void as of July 23, 1955.

The remaining question is whether a discovery of a valuable mineral deposit on the claims was made by The Hazen Corporation in the early part of 1973.

Mr. Meyertons, the mining and metallurgical engineer employed by The Hazen Research Company, testified and described the meeting with representatives of Doria. These representatives requested Hazen to determine what mineral products could be made from the placer sands on the claims (Tr. 818). The first phone call was late in February or early March 1973. The result was the compilation of The Hazen report (Ex. B) prepared by Mr. Meyertons, Mr. Hamling and Mr. Billings. The report and conclusions in the report together with the flow sheet presupposes that a sand and gravel plant costing more than $350,000 (Tr. 662) would be constructed to utilize all the sand and gravel for any use that sand and gravel can be used including aggregate. Figure 5, page 21 shows the boulders (+12" to +18") being eliminated by a grizzly, the +4 mesh segregated for aggregate and the -4 mesh

segregated for further processing for use as feldspathic sand in glass manufacturing. The -4 mesh material is ground to from -28 to +200 mesh and further processed as shown in figure 3, page 12.

Initially Hazen was interested in magnetite, mica, feldspar, quartz, and wanted to check for gold and silver. As the result of a decision by Mr. Meyertons they abandoned the search for gold and silver and they decided not to stress magnetite (Tr. 822). Their effort was directed to the production of a saleable product from the feldspar and silica. All three emphasized that the report was preliminary and that further testing would have to be accomplished before attempting to go into production.

The market for glass sand in the Los Angeles area was being supplied by an operation at Mission Viejo near Capist-

rano[3/] and by an operation at Del Monte. No one from either Doria or Hazen contacted the potential users of feldspathic and silica sand to determine whether there was a market. The three who prepared the report thought that a competitive product could be produced and felt that further effort would be justified in developing a market.

The Hazen report is based on a chemical analysis of one sample from one claim and a visual examination of samples from each of the other claims. The flow sheet and plan of operation require the utilization of the sand and gravel for all purposes. Since the Department has held that the common variety materials can not be used, it is only the feldspathic sand that is subject to location. There was no evidence that this latter material

3/ At the time of the hearing this operation was shut down.

could be economically utilized by itself and no attempt has been made to determine whether it could compete in the existing market. No prudent man would invest his time and means developing any one of the claims until the technology of processing the feldspathic sand has been completed and a reasonably accurate estimation has been made of the cost of production. Until this has been completed there is no way of determining whether the material could compete in the existing market. At this time the evidence is insufficient to satisfy either the prudent man rule or the marketability rule.

In a brief submitted after the hearing the contestees made an extensive quotation from the decision in United States v. Kosankee Sand Corporation, 78 I.D. 285, 3 IBLA 189 (1971). This decision was later set aside and remanded by a

decision of the same name, 80 I.D. 538, 12 IBLA 282 (1973), with the result that it has little or no precedential effect. It did bring out the fact that the economics of glass manufacturing is highly complex. Another recent decision, Interior Board of Land Appeals, on sand and gravel, United States v. A. E. Kottinger, et al., 14 IBLA 10 (November 27, 1973), is so clearly in point that a copy is attached for the information of the parties.

Conclusion

All eighteen claims are declared null and void.

Appeal Information

An appeal from this decision may be taken to the Board of Land Appeals, Office of the Secretary, in accordance with the regulations in 43 CFR Part 4 (revised as of January 1, 1972). Special rules

applicable to public land hearings and appeals are contained in Subpart E. If an appeal is taken, the notice of appeal must be filed in this office (not with the Board) in order to facilitate transmittal of the case file to the Board. If the procedures set forth in the regulations are not followed, an appeal is subject to dismissal. The adverse parties to be served with the notice of appeal and other documents are listed below.

/s/ Graydon E. Holt

Graydon E. Holt
Administrative Law Judge

ITEM NUMBER (a)	CUBIC FEET (c)	TITLE AND DESCRIPTION OF RECORDS (b)	RETENTION (Number of years in addition to current year)				
			OFFICE (d)	STORAGE			EXEMPT (f)
				DEPT. (e)	SHC (f)	TOTAL (g)	
1		Preliminary Files-Field Notes, Boring Reports, Soil and Aggregate Tests, Slide Reports, Pit Files Geotechnical Materials and Spec Reports.	Perm			Perm	
2		Construction Files - Material Test Reports Notice of Materials to be used.	Active +1	15	15	Active +16	
3		Summary of Tests Performed Lab Charges	5			5	
4		Sample Identification Cards (INCLUDES WORK CARDS AND TESTS)	1			1	
5		Tests for Outside Agencies	Active			Active	
		X-Ray Films (Negatives)	Active			Active	

7			Stock Test Reports and Shipments (Hdqtrs)	Active		10	Active +10			
8			Work Cards & Test Reports (Hdqtrs)	Active +2			Active +2			

APPENDIX D

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DORIA MINING & ENGINEERING CORP., etc., Plaintiff, v. JAMES G. WATT, Secretary of the Interior, etc., et al., Defendants.	NO. CV 75-0899-FW FINDINGS OF FACT AND CONCLUSIONS OF LAW [F.R.Civ.P. 41(b)]

The above-entitled action came on for trial to the Court without a jury on October 13, 1981, and proceeded, except for recesses, to February 11, 1982. All parties, through their respective counsel, were present for trial. Plaintiff presented oral and documentary evidence in its case in chief and then rested. Defendants jointly moved for dismissal of the action pursuant to Rule 41(b), F.R.Civ.P.

After considering the pleadings,

the Pretrial Conference Order, the Memoranda of Contentions of Fact and Law, the evidence adduced at trial, and briefs and argument from counsel, the Court now grants the motion pursuant to Rule 41(b), F.R.Civ.P., and makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff, Doria Mining and Engineering Corporation, is a California Corporation, which has its principal place of business within the territorial jurisdiction of this Court.

2. The Federal Defendants are James G. Watt, the Secretary of the Interior; John R. Block, Secretary of Agriculture; Zane G. Smith, Regional Forester, U.S. Forest Service; and Robert Tyrrel, San Bernardino National Forest Supervisor, U.S. Forest Service.

3. The State defendant is the People of the State of California, acting by and through the Department of Transportation ("State").

4. The private defendant is Calnev Pipeline Company, a Delaware corporation ("Calnev").

5. Plaintiff initiated this action on March 12, 1975 by filing its "Complaint for Review of Decision Invalidating Mining Claims and for Declaratory Judgment of Validity and for Injunctive Relief." On June 19, 1980, plaintiff filed an "Amended Complaint for Review of Administrative Decision."

6. The Federal Defendants, the State, and Calnev duly filed separate Answers and joined issue on the material allegations of the "Amended Complaint."

7. The Court has jurisdiction for judicial review of the Administrative Record in State of California, et al., v.

Doria Mining & Engineering Corp., et al., 17 IBLA 380 (Oct. 31, 1974), pursuant to 28 U.S.C. §1331 and 5 U.S.C. §§701 et seq.

8. The plaintiff asserts a possessory interest to lands of the United States of America by virtue of the filing and recordation of 18 unpatented placer mining claims before 1955. Said claims were filed and recorded during the period March 1, 1953 to July 12, 1955. The claims were filed for sand and gravel, and since 1973 have also been claimed to contain feldspathic sands. They are situated in sections 14 and 23, T. 3 N., R. 6 W., S.B.M., within the Cajon Ranger District of the San Bernardino National Forest, in the County of San Bernardino, California, and are more particularly described in Exhibit "A" hereto.

9. The United States Department of Transportation duly issued a highway easement to the State of California on

or about September 26, 1968, under authority of the Federal Aid Highway Act of August 27, 1958, as amended, 23 U.S.C. §107 (d). Pursuant thereto, the State constructed a portion of Interstate Highway 15 ("I-15") across a portion of the lands embraced in the plaintiff's unpatented mining claims.

10. The United States Forest Service duly issued Special Use Permits to Calnev Pipeline Company on or about January 1961 and March 1970, pursuant to which Calnev constructed pipelines across a portion of the lands embraced in the plaintiff's unpatented mining claims.

11. The highway easement and the special use permits were issued subject to all valid existing claims, if any, on the public national forest lands included therein.

12. On or about December 30, 1970, plaintiff filed suit in the Superior

Court for San Bernardino County, California (No. 152480) against Calnev Pipeline Company, alleging trespass over and inverse condemnation of its 18 unpatented mining claims due to construction of pipelines. On or about January 5, 1971 plaintiff filed a second suit in the same state court (No. 152504) against the People of the State of California alleging trespass and inverse condemnation of its 18 unpatented mining claims due to construction of I-15. In said lawsuits plaintiff seeks total damages in excess of $15 million against the State and Calnev.

13. In July 1972 the State and Calnev initiated private validity Contest No. R-4873, invoking the administrative contest procedures of the Office of Hearings and Appeals of the United States Department of the Interior, pursuant to 43 C.F.R. §§4.450-1 et seq. The contes-

tants, the State and Calnev, claimed an interest adverse to plaintiff in the federal lands over which the easement and special use permits had been issued. The Contest Complaint charged that the 18 unpatented placer mining claims were invalid for lack of a discovery of any valuable mineral deposits within the limits of the claims. In January 1973 the United States of America, represented by subordinates of the Secretary of Agriculture, intervened in the administrative proceedings on the side of the State and Calnev. Following a lengthy hearing before an Administrative Law Judge of the Hearings Division of the Office of Hearings and Appeal of the Department of the Interior, the Administrative Law Judge (ALJ) issued a decision on December 26, 1973 declaring that each and all of the plaintiff's 18 unpatented mining claims were null and void.

14. The decision of the ALJ was appealed by plaintiff to the Interior Board of Land Appeals ("IBLA") of the Office of Hearings and Appeals, Department of the Interior. On October 31, 1974 the IBLA published a twenty-one (21) page decision affirming the decision of the ALJ. State of California, et al. v. Doria Mining & Engineering Corporation, et al., United States, Intervenor, 17 IBLA 380 (1974).

15. The IBLA found, inter alia, that the State and Calnev had standing to initiate a private administrative validity contest before the Office of Hearings and Appeals of the Department of the Interior; that the subordinates of the Secretary of Agriculture on behalf of the U.S. Forest Service had authority to intervene in the private contest in the name of the United States pursuant to 43 C.F.R. §4.451-1, which provides that

the United States may initiate a contest "for any cause affecting the legality or validity of any entry or settlement or mining claim;" that after the contestants' presentation of a prima facie case of invalidity the burden of producing persuasive evidence of the validity of the mining claims had shifted to the plaintiff; and that plaintiff failed to establish a discovery of a valuable deposit of sand and gravel on any of its claims prior to July 23, 1955, when the Common Varieties Act, 30 U.S.C. §611, withdrew such deposits from location under the mining laws. The IBLA also found that plaintiff had failed to establish a discovery of the claimed deposit of feldspathic sands.

16. The plaintiff filed its suit for judicial review of the IBLA decision on March 12, 1975. On April 26, 1976 plaintiff moved this Court for per-

mission to file an amended complaint alleging that the IBLA's decision was based on fraudulent and wholly unreliable evidence. The plaintiff's motion was vacated on June 18, 1976 and the amended complaint was not filed. On September 26, 1976 the Court granted the motion for summary judgment filed jointly by the State, Calnev, and the Federal Defendants.

17. The plaintiff appealed to the Ninth Circuit Court of Appeals, and on November 2, 1979, that court ruled that it was appropriate for this Court to consider evidence extrinsic to the Administrative Record in order to evaluate plaintiff's allegations of fraud on the administrative contest hearing before the ALJ. The Circuit Court vacated the summary judgment previously obtained by the defendants and remanded this action.

18. The plaintiff presented

thirteen (13) days of testimony and other evidence in support of the allegations of its "Amended Complaint." The plaintiff has rested its case and the defendants have jointly moved for dismissal, pursuant to Rule 41(b), F.R.Civ.P., on the grounds that upon the facts and the law the plaintiff has shown no right to relief.

19. The Court finds that plaintiff adduced no evidence that intervention of the Secretary of Agriculture, through his subordinates, in the administrative validity contest was not in good faith, or was not within the discretion of officers of the United States who are charged with the administration of public lands to the end that valid mining claims are recognized and that invalid mining claims are eliminated.

20. The contestants' expert witness, Mr. G. Austin Shroter, was a regis-

tered geologist of many years experience in evaluating mineral properties, who conducted tests of samples of in-place materials taken from each of the subject unpatented placer mining claims.

21. The document identified as "Exhibit 14-A" in the hearing before the ALJ was offered by the contestants and was admitted into evidence in the Administrative Record as a tabulation of test results for sand and gravel. It was introduced by contestants to show the lack of quality of the material on the subject claims for uses as sand and gravel aggregates.

22. The test results tabulated in Exhibit 14-A were based on samples taken from the subject mining claims under the direction of Mr. Schroter, and were representative of the material at the sites of sampling.

23. The samples taken by Mr.

Schroter were delivered to the State's materials testing laboratory, the District 08 Materials Laboratory, and were logged in pursuant to customary procedures.

24. Standard aggregate tests on the samples taken under Mr. Schroter's direction from each of the mining claims were performed in April and May of 1972 by personnel of the materials testing laboratory. The testing was done pursuant to test methods promulgated in the State's Materials Manual of Testing and Control Methods, and the results of those tests were duly recorded on twenty-two (22) standard test sheets designated "HMR T-361."

25. A number of the samples which Mr. Schroter delivered to the laboratory for testing were composited, namely, where an individual sample did not contain enough rock or "+4" material

to perform one of the standard tests for aggregate. The compositing of samples from some of the subject claims was noted by Mr. Schroter in his tabulation of test results introduced into evidence as Exhibit 14-A at the administrative contest hearing.

26. The twenty-two original test sheets or "work cards" contained on their reverse sides the weights of the samples on which the tests were run. Said original work cards were routinely and customarily discarded by the materials testing laboratory approximately one year after tests were run. The face, or front page, of each work card, which showed test results, was copied and retained as a permanent record.

27. The practice of discarding the work cards and preserving a copy of the test results was in accordance with the accepted policy of the District 08

Materials Laboratory in 1972 and 1973.

28. The materials testing laboratory was not requested to retain the original work cards for the samples taken under Mr. Schroter's direction from the subject placer claims, and the laboratory personnel did not seek any directions as to retention or destruction of such records from counsel for the State.

29. During 1972 and 1973 the State's counsel, in particular Mr. Vidor, did not receive the originals, nor copies, of the twenty-two (22) work cards. The originals, and/or any copies, were not included in the Mineral Evaluation Report which was submitted to counsel for the State and Calnev in June of 1972.

30. Neither Mr. Schroter nor Mr. Vidor ever saw any of the original work cards on which the results of the various tests on the samples from the placer claims were recorded.

31. Mr. Vidor, counsel for the State, first saw copies of the face cards of the work cards in July or August of 1975, approximately two (2) years after the contest hearing before the ALJ.

32. Mr. Schroter testified on behalf of the defendants-contestants in April 1973 at the administrative hearing before the ALJ. The plaintiff, through its counsel, was given a full opportunity for cross-examination to inquire into Mr. Schroter's field sampling methods, the weights of samples submitted for testing, the preparation of samples, the bagging of samples, and all other underlying data upon which Exhibit 14-A was compiled.

33. The transcript of the six days of hearing before the ALJ reveals no cross-examination of any degree more than a cursory nature of Mr. Schroter as to the matters set forth in Exhibit 14-A.

34. The evidence adduced at the

administrative hearing before the ALJ as well as that presented by plaintiff at the trial before this Court demonstrates that Mr. Schroter at no time made a false statement with respect to a fact material to an issue or a point of inquiry, nor in an intentional manner, and with any awareness of any actual fact to the contrary.

35. The evidence adduced at the administrative hearing before the ALJ as well as that presented by plaintiff at the trial before this Court demonstrates that Mr. Vidor and other witnesses charged by plaintiff at no time made any false statements with respect to a fact material to an issue or point of inquiry, nor in an intentional manner, and with an awareness of any actual facts to the contrary.

36. At or prior to the six days of hearing before the ALJ the plaintiff had the opportunity to discover and examine the original twenty-two (22) work

cards, or copies thereof, and thereby adduce evidence of any purported irregularities or defects in the weights of the samples tested, the representativeness of the samples to the materials in place on the claims, and the propriety of compositing samples in arriving at test results presented by defendants-contestants.

37. In 1969 the plaintiff obtained a sample from an area of the eighteen (18) claims for Mr. Hove, the operator of a ready-mix aggregate plant. The sample was tested and results of that test showed that the material was substandard for Mr. Hove's further interest, and was too poor for commercial production.

38. An agreement, the so-called "Lease Option," entered into between plaintiff and Owl Services Products was never utilized by the latter. In the

opinion of Mr. Curtin, Owl's technical services manager, a continuous commercial aggregate operation could not have been installed at the site of the claims because the quality of the material was poor and the market in the latter part of the 1960's was adequately covered by other producers in the San Bernardino-Victorville area.

39. No sales of material from the claims occurred either before or after 1955. Mr. J.J. Schweitert, an original filer of some of the claims, testified before the ALJ that he had stockpiled material from the claims but never had sold any.

40. Even if the materials on the subject claims were of sufficient quality for commercial aggregates, said materials had never been sufficiently in local demand so that the additional material from the claims could have been

absorbed in the market at a profit from 1953 to 1973.

41. The Court finds that there is substantial evidence in the Administrative Record to support the IBLA's findings that the material on the claims was and is composed of a common variety of sand and gravel which could not have been developed, mined and processed at a profit prior to the Surface Uses Act of July 23, 1955. Said substantial evidence includes:

(a) The testimony of G. Austin Schroter, a qualified consulting geologist and mining engineer, that the material on the claims did not meet minimum specifications required for commercial aggregate as of July 23, 1955, and that there was no market for said material during or prior to 1955, inasmuch as superior grade materials were available in proximity to the San Bernardino

and Victorville markets during 1953-1955.

(b) The testimony of George Thwing, Jr., a business consultant and retired president of Triangle Rock Products Co., of lack of profitability and lack of marketability for the materials on the claims in 1955, or thereafter.

(c) The testimony of Edward Curtin and Robert Hove which substantiated the proof of the inferior quality of the sand and gravel on the claims and the lack of reasonably continuous marketability.

42. The contestants established a prima facie case of invalidity of the claims at the contest hearing before the ALJ, and thereafter the plaintiff-contestee had the burden of producing evidence and persuading the trier of fact that there had been a discovery of a valuable mineral deposit on each of the eighteen (18) placer mining claims.

43. The testimony and evidence produced on behalf of the plaintiff-contestee at the administrative hearing before the ALJ failed to sustain its burden of proof of validity in that:

(a) Plaintiff-contestee's witnesses Schweitert and Hutchinson failed at the hearing to substantiate their opinion that the sand and gravel on the claims could be commercially exploited with any market analysis, production data, or record of sales of the materials. The Court finds that sporadic gifts of materials extracted from public lands do not support a finding of marketability.

(b) The 1973 report of the Hazen Research Company, submitted by the plaintiff-contestee at the administrative hearing, also failed to establish a market for sand and gravel from the claims prior to July 23, 1955, the date the Sur-

face Resources Act withdrew sand and gravel from location pursuant to the mining laws. The plaintiff-contestee introduced evidence at the administrative hearing that the Hazen Company had only obtained samples from some of the eighteen (18) claims.

(c) The testimony of Mr. Hamling, who took samples for the Hazen Company, at the administrative hearing demonstrated that he did not analyze the samples he took, nor did he investigate the market for the materials on the claims.

(d) The testimony of Mr. Billings a glass sands technologist consulted by Hazen, at the administrative hearing, revealed that he made no cost analysis respecting the commercial feasibility of producing feldspathic sands for the glass industry. Mr. Billings also failed to make other than a visual in-

spection of samples from 16 of the claims, and he qualified his opinion as to feasibility by recommending further sampling and testing to determine the quantity and quality of feldspathic materials. He recommended that the market be further investigated before any money was invested in production of feldspathic sands.

(e) The testimony at the administrative hearing of Mr. Meyertons, another of plaintiff-contestee's witnesses, disclosed that the portions of samples from materials from the claim which he had sent to Pacific Materials Laboratory, Inc., in Bloomington, California, had resulted in an evaluation that the material was of poor quality for aggregate. Mr. Meyertons also recommended further sampling of materials on the claims, and the flow sheet which was developed in the Hazen Report was in essence a technical feasibility study,

and not a marketability study.

(f) The testimony of Mr. Longfield, another of plaintiff-contestee's witnesses at the administrative hearing, showed that materials on the claims were at the best marginal. Mr. Longfield was a consultant for the construction aggregate business and long involved in the sand and gravel business. Mr. Longfield also testified that needs of the area as of the relevant time frame were being supplied by established firms with superior sand and gravel deposits. Mr. Longfield's testimony further established that there was no reasonably continuous market for sand and gravel in the vicinity of the claims during the period 1953-1955 or thereafter.

44. The preponderance of the evidence in the Administrative Record establishes that plaintiff did not meet the judicially approved test of discovery

which requires that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine on the public lands, Castle v. Womble, 19 L.D. 445, and the present and continuing marketability test which requires a showing that the sand and gravel could have been extracted, removed, and marketed at a profit prior to the effective date of the Surface Resources Act of July 23, 1955. United States v. Coleman, 390 U.S. 559 (1968).

45. Plaintiff-contestee's own witnesses established by their testimony in the Administrative Record that at the time of the contest proceedings the plaintiff-contestee was engaged in exploration for feldspathic sands suitable for use in the commercial production of glass, but had not made any discovery which would satisfy the prudent man test

and the marketability test for feldspathic sands. Duval v. Morton, 347 F.Supp. 501.

46. The decision of the IBLA declaring the eighteen (18) unpatented placer mining claims null and void is supported by substantial evidence in the Administrative Record and is based upon the application of the proper legal standards. The IBLA decision, reported at 17 IBLA 381, is not arbitrary, capricious, or an abuse of discretion, and is binding upon the Court.

CONCLUSIONS OF LAW AND ADDITIONAL FINDINGS

1. The plaintiff has failed to present sufficient evidence to sustain its burden of proof that the decision of the IBLA was obtained by a fraud on the administrative proceeding.

2. The jurisdiction of this Court upon remand is limited by the deci-

sion of the Court of Appeals, Doria Mining & Engineering Corp. v. Morton, 608 F.2d 1255 (9th Cir. 1979), to determining if plaintiff has produced persuasive, extrinsic, and "new" evidence of fraud on the administrative proceeding.

3. The Court finds and concludes that plaintiff has not demonstrated that its failure to raise its questions as to Exhibit 14-A to the ALJ was not grossly negligent on the part of plaintiff, or that such "evidence" was not otherwise reasonably available to the plaintiff at the time of the hearing before the ALJ, or that plaintiff had been prevented in any way from conducting its own testing of the subject claims prior to the hearing before the ALJ.

4. The plaintiff had due process and a full and fair hearing in the administrative proceedings before the Office of Hearings and Appeals of the Department

of the Interior.

5. The Court finds and concludes that there was no intentionally false and misleading material evidence adduced by the defendants-contestants in the administrative proceedings and no fraud, either extrinsic or intrinsic, on the ALJ and the IBLA.

6. The Court finds and concludes there was no bad faith on the part of the Federal Defendants in deciding to intervene in the administrative proceedings on behalf of the State and Calnev, since such investigations into validity of mining claims and the filing of administrative validity contests is committed by law to the discretion of the subordinates of the Secretary of Agriculture and the Secretary of the Interior.

7. Plaintiff is not entitled to a de novo trial regarding issues of the quality, quantity or marketability of

material from the area of the claims, the uses of the material, if any, from the dates of the filing and recording of the location notices for these claims. Henrickson v. Udall, 350 F.2d 949 (9th Cir. 1965).

8. The defendants, the State, Calnev, and the Federal Defendants, are entitled to Judgment affirming the decision of the Interior Board of Land Appeals, which declared each and all of the subject eighteen (18) unpatented placer mining claims to be null and void.

9. The defendants are entitled to Judgement dismissing this action.

DATED: This 30 day of September, 1982.

/s/ Francis C. Whelan
UNITED STATES DISTRICT JUDGE

Presented by:

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DORIA MINING & ENGINEERING CORP., etc.,	)	
Plaintiff,	)	NO. CV 75-0899-FW
v.	)	
JAMES G. WATT, Secretary of the Interior, etc., et al.,	)	JUDGMENT
Defendants.	)	

The plaintiff having presented and rested its case in chief on the issues raised by the Amended Complaint for Review of Administrative Decision and the Answers thereto filed by defendants; and

Defendants having jointly moved for dismissal of plaintiff's action under Federal Rules of Civil Procedure, Rule 41(b); and

The Court having granted defendants' Motion and having filed its Findings of Fact and Conclusions of Law on

Dismissal of plaintiff's Action;

NOW, THEREFORE, IT IS HEREBY, ADJUDGED AND DECREED:

1. Plaintiff's causes of action and each of them, for remand of the decision of the defendant, Secretary of the Interior (Secretary) in Administrative Contest No. R-4873, State of California, et al. v. Doria Mining and Engineering Corp., et al., 17 IBLA 380 (Oct. 321, [sic] 1974), on the grounds of alleged false, fraudulent and misleading evidence adduced by defendants in said Contest No. R-4873, are unsupported by the evidence and are DISMISSED as to each and all defendants herein.

2. The decision of defendant Secretary in Administrative Contest No. R-4873 declaring all 18 unpatented placer mining claims of plaintiff null and void for lack of discovery of any valuable mineral deposits within the boundaries

of said claims is supported by substantial evidence in the administrative record and is AFFIRMED.

3. The unpatented mining claims of Plaintiff declared null and void are more particularly described in Exhibit "A" hereto attached, and made a part hereof. The National Forest lands described in Exhibit "A" are free and clear of any claim to a possessory interest therein by plaintiff. Plaintiff has no right title or interest in or to the said described National Forest lands.

4. The plaintiff shall take nothing by its Amended Complaint and defendants and each of them, shall recover their costs of this action against plaintiff.

DATED: This 30 day of September, 1982

/s/ Francis C. Whelan
UNITED STATES DISTRICT JUDGE

Presented by:

JOSEPH A. MONTOYA, ROBERT L. MEYER

By /s/ Robert W. Vidor
ROBERT W. VIDOR

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APPENDIX E

30 U.S.C. § 22.

"Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

30 U.S.C. § 35.

"Claims usually called 'placers,' including all forms of deposit, excepting veins of quartz, or other rock in place,

shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States the entry in its exterior limits shall conform to the legal subdivision of the public lands. . . ."

30 U.S.C. § 611.

SUBCHAPTER II. - MINING LOCATIONS

"No deposit or common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: Provided, however, That nothing herein shall affect the validity of any mining location based upon discovery of some

other mineral occurring in or in association with such a deposit. 'Common varieties' as used in sections 601, 603, and 611 to 615 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more. 'Petrified wood' as used in sections 601, 603, and 611 to 615 of this title means agatized, opalized, petrified, or silicified wood, or any material formed by the replacement of wood by silica or other matter."

APPENDIX F

OPINION

United States Court of Appeals,
for the Ninth Circuit

Doria Mining and Engineering Corporation, Plaintiff-Appellant, vs. Rogers Morton, Secretary of the Interior, Calnev Pipeline Company, a corporation, the State of California, Douglas Leisz, as Regional Director of the United States Forest Service, and Harold Mitchell, as Acting Forest Supervisor of San Bernardino National Forest, Defendants-Appellees.
No. 77-1163.

Appeal from the United States District Court for the Central District of California.

Filed: Nov. 2, 1979.

Before: TRASK and WALLACE, Circuit Judges, and SOLOMON,* District Judge.

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* Honorable Gus J. Solomon, United States Circuit Judge, District of Oregon, sitting by designation.

WALLACE, Circuit Judge:

Doria Mining and Engineering Corporation (Doria) appeals from a summary judgment in which the district court affirmed an administrative decision by the Department of the Interior Board of Land Appeals (IBLA) regarding the validity of various placer mining claims. Among other things, Doria alleged that the IBLA decision was obtained by fraud and perjury, but the district court would not consider this allegation because it was based on evidence not found in the administrative record. We vacate the summary judgment and remand to the district court.

I

Doria has asserted a possessory interest in 18 placer claims (for the discovery of valuable sand and gravel deposits) which has been obtained from the United States Forest Service by

Doria's predecessors in interest. The Forest Service granted to the State of California an easement across portions of land covered by Doria's purported claims, on which California subsequently built part of Interstate Highway 15. The Forest Service also granted special use permits to Calnev Pipeline Company (Calnev), which enabled it to construct a pipeline across land covered by Doria's claims. Both the easement and the permits were issued "subject to existing claims," but neither California nor Calnev sought permission from Doria before engaging in their construction projects. In 1970 and 1971, Doria filed actions against California and Calnev in California superior court alleging trespass and inverse condemnation.

In 1972, California and Calnev initiated private contest proceedings in the Department of the Interior pursuant

to 43 C.F.R. § 4.450-1, claiming interests adverse to Doria's in the lands on which Doria's purported placer claims were located, and alleging that the claims were invalid for failure to discover a valuable mineral deposit within their limits. The United States subsequently intervened as a contestant on behalf of the Forest Service. Following a hearing, an administrative law judge ruled that the claims were invalid, and, on appeal, the IBLA affirmed.

Doria requested reconsideration of the IBLA judgment, based on "suspicions" that the contestants' primary expert witness, Schroter, had fraudulently altered mineral samples from Doria's claims, and had perjured himself in testifying about his sampling and testing methods. Upon denial of the request, Doria filed a complaint in district court pursuant to 28 U.S.C. § 1331(a)

and portions of the Administrative Procedure Act, 5 U.S.C. §§ 701-06,[1] for judicial review of the IBLA judgment. Based upon the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, Doria also requested a judgment declaring that its placer claims were legal and valid. The complaint did not allege that Schroter had committed either fraud or perjury before the IBLA.

Doria claims that thirteen months after commencing its district court review action, it discovered in the collateral state proceedings what it believed was strong evidence of fraud and perjury by Schroter in the IBLA proceed-

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[1]Subsequent to Doria's filing of its complaint, the Supreme Court held that jurisdiction to review administrative decisions by the Secretary of the Interior is conferred on the district court by section 1331, and not by the Administrative Procedure Act. See Andrus v. Charlestone Stone Prods. Co., 436 U.S. 604, 607 n.6 (1978).

ing. Doria asserts that it immediately moved the district court for leave to amend its complaint to include allegations of such misconduct. The district judge took the motion under submission.

One month later, Doria renewed its motion for leave to amend and, in the alternative, moved for a stay of the district court proceedings pending an attempt to obtain a rehearing before the IBLA based on the purported new evidence. Both motions were denied, and the district judge subsequently granted summary judgment affirming the IBLA decision. Doria then moved for, and the district judge summarily denied, relief from judgment pursuant to Fed. R. Civ. P. Rule 60(b)(3).

Doria raises three issues on appeal: (1) whether the district court erred in denying, on jurisdictional grounds, Doria's motion for leave to

amend its complaint or, in the alternative, for a stay of proceedings; (2) whether Doria's allegations of fraud and perjury raised factual issues that made the district court's subsequent granting of summary judgment improper; and (3) whether the district judge's summary denial of Doria's Rule 60(b)(3) motion constituted an abuse of discretion. We find it necessary to consider only the first issue.

II

The district courts have jurisdiction to review administrative decisions of the Secretary of the Interior pursuant to 28 U.S.C. § 1331(a). Andrus v. Charlestone Stone Prods. Co., 436 U.S. 604, 607 n.6 (1978). When the regulations governing an administrative decision-making body require that a party exhaust its administrative remedies prior to seeking judicial review, the party

must do so before the administrative decision may be considered final and the district court may properly assume jurisdiction. Eluska v. Andrus, 587 F.2d 996, 999 (9th Cir. 1978); Montgomery v. Rumsfeld, 572 F.2d 250, 252-53 (9th Cir. 1978); see 5 U.S.C. § 704.

Department of Interior regulations do require that administrative remedies must be exhausted before any administrative decision from the Department is subject to judicial review. 43 C.F.R. § 4.21(b). Administrative remedies are deemed exhausted upon disposition of a claim which is not appealable to either the Director of the Interior Office of Hearings and Appeals or an Appeals Board such as the IBLA. Id. § 4.21(b). A decision of the IBLA is not subject to further appeal before either the Director or any Appeals Board. Id. § 4.21(c). When Doria lost before

the IBLA, therefore, it had exhausted its administrative remedies, and the IBLA determination constituted the Secretary of the Interior's final decision to deny the validity of Doria's purported placer mining claims. The district court thus had jurisdiction to review the IBLA judgment.

III

The district court, however, denied Doria's motion for leave to amend, apparently on the ground that the court was without jurisdiction to consider evidence not found in the administrative record.[2] It is true that the appropriate

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[2]The exact language of the district judge, in colloquy with counsel, was as follows:

> THE COURT: No, I think that I will take your matter to amend under submission . . . but I just don't think I have jurisdiction. You are attacking the matter collaterally. You can't do it.
>
> . . . .

standard for review of administrative proceedings is whether the administrative findings are supported by substantial evidence in the record as a whole. See, e.g., Universal Camera Corp. v. NLRB, 340 U.S. 474, 490-91, 493, 497 (1951); 5 U.S.C. § 706. When, however, the party seeking review alleges that it has discovered new evidence showing that the decision before the court for review was obtained by a fraud on the administra-

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[2](continued)

THE COURT: If somebody has perjured himself, why don't you refer it to the United States Attorney?

. . . .

THE COURT: To the criminal section.

. . . .

THE COURT: I will take it under submission but I just don't think I have any more right to interfere with . . . in this kind of a basis than I would have the right to intervene in a State Court trial proceeding.

The district judge ultimately denied Doria's motion without comment, and without giving Doria an opportunity to develop the motion's evidentiary foundation.

tive proceeding, we hold that the reviewing court may consider evidence extrinsic to the record in determining whether such allegations are meritorious.

Although no case was cited to us, and we have found no case which is direct authority for our conclusion, Standard Oil Co. v. Montedison, S.P.A., 540 F.2d 611 (3d Cir. 1976), is instructive. In that case, the plaintiffs had filed, pursuant to 35 U.S.C. § 146, for district court review of a decision by the Board of Patent Interferences (Board). They later sought leave from the district court to amend their complaint to include allegations of fraud in the proceedings before the Board. Believing that it was not empowered to consider an issue that had not been raised before the Board, the district court denied the plaintiffs' motion to amend. Id. at 618. On appeal, the Third Circuit held that "in appropri-

ate circumstances the district court may, in [a section 146] action, in the exercise of a sound discretion, permit an issue of fraud which infected the Board's determination to be raised though it was not raised in the interference proceeding." Id. at 617. The court enumerated a number of factors which the district court should consider when deciding whether to exercise discretion to hear new allegations of fraud,[3] and then stated: "If after considering all relevant factors the court concludes that manifest injustice to the parties and the public will otherwise result, it should permit

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[3]These factors include: (1) whether there was "suppression, bad faith, or gross negligence on the part of the plaintiff in failing to raise the issue of fraud before the Board"; (2) whether evidence of the alleged fraud was reasonably available" at the time the dispute was before the Board; and (3) whether the issue "has been or may be more conveniently and expeditiously raised in another" forum." 540 F.2d at 617.

the issue to be raised for the first time in the § 146 proceeding." Id.

Montedison's holding that a court reviewing an administrative determination may properly exercise its discretion to hear an issue of fraud not presented before the administrative body, and hence not found in the administrative record, finds some support in earlier cases. See Interstate Investors, Inc. v. United States, 287 F. Supp. 374, 382-84 (S.D. N.Y. 1968) (three-judge court) (court reached the merits of complaint seeking to set aside an administrative decision for fraud, based on evidence not contained in the administrative record), aff'd, 393 U.S. 479 (1969) (per curiam); cf. United States v. Shotwell Mfg. Co., 355 U.S. 233, 240-45 (2957) (allegation that new evidence had been discovered showing fraud had been committed on the district court; Supreme Court considered

such evidence in deciding that vacation and remand were required). See also Linn and Lane Timber Co. v. United States, 236 U.S. 574, 578-79 (1915) (a decision by the Secretary of Interior to issue land patents is open to reconsideration by the courts when the issuance has been obtained by fraud.[4]

Although the circumstances of Montedison are not identical to those of this case,[5] the rationale of that case--

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[4]But see Iron Ore Co. of Canada v. Dow Chem. Co., 177 U.S.P.Q. 34, 43-44 (D. Utah 1972) (district court indicated that, generally, it need not consider a newly raised issue in a section 146 proceeding), aff'd on other grounds, 500 F.2d 189 (10th Cir. 1974). See also Standard Oil Co. v. Montedison S.p.A., 540 F.2d 611, 616 n.10 (3d Cir. 1976), (finding Iron Ore Co. unpersuasive authority on question whether new issue of fraud may be raised before reviewing court).

[5]An action taken in district court pursuant to 35 U.S.C. § 146 is procedurally a trial de novo, whereas judicial review of an IBLA judgment is not. The court in Montedison, however, observed

that in certain circumstances a court reviewing an administrative decision should hear new allegations of fraud based on evidence extrinsic to the record in order to prevent injustice--is equally applicable here. Newly discovered evidence of fraud and perjury in an administrative proceeding will not be found in the administrative record. If the reviewing court, in the face of an allegation that such evidence exists and that administrative

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[5](continued)
that a section 146 review proceeding "is ordinarily subject to the general rule of estoppel applicable to proceedings for the review of administrative agency actions that consideration of issues ancillary to priority is limited to those issues which have been raised before the Board in the interference proceeding." Standard Oil Co. v. Montedison S.p.A., supra, 540 F.2d at 616 (footnote omitted). Insofar as allegations of fraud extrinsic to the administrative record are concerned, then, district court review of administrative proceedings, pursuant to section 146, is, as viewed by Montedison, indistinguishable from judicial review of IBLA proceedings.

remedies have been exhausted, nevertheless confines itself to consideration only of evidence in the record, the party seeking review is left without any forum in which to argue the allegedly fraudulent basis of the administrative judgment. This is precisely what happened to Doria.[6]

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[6]During oral argument, the government contended that the proper forum for consideration of Doria's new evidence of alleged fraud and perjury was the Department of the Interior. The record, however, suggests that, as a matter of policy, the Department of the Interior refuses to grant requests for reconsideration of an administrative determination when the decision is before the district court for review. This was the Department's reason for denying Doria's first request for reconsideration, and the government itself stated during oral argument that it was also the basis for denying Doria's second request for reconsideration, made while this appeal was pending. In view of this apparent policy, it is at best questionable whether the proper forum for Doria to present its allegations of fraud rests in the Department of the Interior. In any case, this would not appear to implicate the jurisdiction of a reviewing district court to consider such evidence, because the Department does not require that a party's exhaustion of its administrative

We conclude that the importance of preventing the prejudice to Doria and similarly situated parties which arises out of circumstances such as those before us outweighs any countervailing interests which administrative agencies and other parties which appear before them may have in the finality of agency decisions. Cf. Nasem v. Brown, 595 F.2d 801, 806-07 (D.C. Cir. 1979) (consideration of applicability of collateral estoppel doctrine; court states that doctrine represents balance of needs of judicial finality and efficiency as against need for fairness and accuracy, and concludes that "[t]he advantages of finality . . . can only be fairly garnered when the party to be estopped has had an adequate oppor-

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[6](continued)
remedies prior to seeking judicial review include a request for reconsideration of the administrative decision. 43 C.F.R. § 4.21(c).

tunity to litigate his claims" id. at 806).

We thus hold that it was error for the district court to deny, for lack of jurisdiction, Doria's motion for leave to amend its complaint. Because we do not know how the district judge would have ruled on the motion had he believed he had jurisdiction, we vacate the summary judgment affirming the IBLA decision.[7] We remand to the district court for further proceedings consistent with this opinion, including consideration of the merits of Doria's motion.[8]

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[7]It is thus unnecessary to decide whether the district court erred in granting summary judgment in the face of Doria's allegations of fraud and perjury.

[8]Because, in arguing the merits of its motion, Doria will have an opportunity to present to the district court its new evidence of alleged fraud and perjury, we also find it unnecessary to consider Doria's suggestion that the district court erred when it refused to

VACATED AND REMANDED.

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[8](continued)
consider the new evidence in connection with Doria's Rule 60(b)(3) motion.

23 May, 1972
Doria Mining & Engineering Corp.
Placer Claims

G. AUSTIN SCHROTER

CONSULTING ENGINEER - GEOLOGIST

T A B L E 5

STANDARD SAND-GRAVEL TESTS

FOR SAND-GRAVEL AGGREGATES

Placer Claims in Secs. 14 & 23,
T. 3 N., R. 6 W., S.B.B.M.

Sample	Sand/ Gravel Field	Sand/ Gravel Lab.[5]	loss L.A. Rattler 100 Rev.[5]	loss L.A. Rattler 500 Rev.[5]	Sand Equivalent[5]
Barren	67/33	75/25	19%	54%	56
Rattler	82/18	85/15	--	58*	60
Mesquite	65/35	75/25	--	58*	37
Lizard Gulch	76/24	69/31	--	58*	45
Many Stones	67/33	75/25	14	49	36
Old Sunny	70/30	70/30	21	61	41
Clear View	79/21	79/21	--	58*	30
Buster	67/33	70/30	--	58*	39
Buck Shot	72/28	77/23	--	58*	31
Wild Trail	72/28	78/22	19	58	40

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Sample	Sand/ Gravel Field	Sand/ Gravel Lab.5	loss L.A. Rattler 100 Rev.5	loss L.A. Rattler 500 Rev.5	Sand Equivalent5
Harbor	81/19	82/18	20**	58**	37
Old Blister	80/20	78/22	18	53	37
Hawk	84/16	85/15	20**	58**	39
Baldy	84/16	82/18	20**	58**	37
Sand Bank	77/23	84/16	20	59	30
Outlook	78/22	79/21	16	50	34
Delight	65/35	68/32	15	53	37
Sunsbine	72/28	78/22	20**	58**	43
Sunshine #2[1]	61/39	68/32	15	46	66
Harbor #2[2]	65/35	61/39	18	57	62

Sample	Sand/ Gravel Field	Sand/ Gravel Lab.[5]	loss L.A. Rattler 100 Rev.[5]	loss L.A. Rattler 500 Rev.[5]	Sand Equivalent[5]
Many Stones #2[3]	72/28	73/27	25	60	50
Mesquite #2[4]	82/28	79/21	18	55	46

NOTES

No. 1 Sample in Qal alluvium. 1st sample in Dibblee's "Qsg - sand & gravel".

No. 2 Sample at new location after finding location monument.

No. 3 Many Stones location monument (unnumbered sample) actually in Harbor claim. No. 2 sample is in true Many Stones claim.

No. 4 Mesquite sample west of freeway, east of power line.

No. 5 Tested at our request in Dist. 08 Lab., Div. Highways.

* Composite of Buck Shot, Rattler, Clear View, Lizard Gulch,

Buster, Mesquite.

** Composite of Sunshine, Hawk, Baldy, Harbor.

T A B L E 6

MINIMUM REQUIRED SPECIFICATIONS

Sand/Gravel Ratio: max. 65% sand/min. 35% gravel

Abrasion (L.A. Rattler), max. permissible losses:

By A.S.T.M. Test #C-33: 50% loss @ 500 revolutions

Asphaltic Concrete, Type A: 10% loss @ 100 revolutions
45% loss @ 500 revolutions

Sand Equivalent (SE): Type A, asphaltic concrete minimum 48

No. 83-856

IN THE

Supreme Court of the United States

DORIA MINING AND ENGINEERING CORPORATION, a Corporation,

Petitioner,

vs.

JAMES G. WATT, etc., *et al.*,

Respondents.

BRIEF OF RESPONDENTS, STATE OF CALIFORNIA AND CALNEV PIPELINE CO. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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No. 83-856

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BRIEF OF RESPONDENTS, STATE OF CALIFORNIA AND CALNEV PIPELINE CO. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The factual matters appearing at pages 2, 3 and 4 of Doria's Petition are generally accurate. However, under the heading "Opinions and Decisions Below" there is omitted any reference to the exhaustive opinion of the Interior Board of Land Appeals, dated October 31, 1974, affirming the decision of Administrative Law Judge Graydon E. Holt. Respondents include the decision below in their brief as Appendix I.

Statement of the Case.

At pp. 11-18 of the Petition, Doria has summarized in a selective, argumentative and misleading form, certain items of testimony and evidence heard by the district court. For example, some, but not all, of the Schroter samples were insufficient in rock content to perform individual LART tests. For this reason, the decision was made to composite some of the samples. Mr. Schroter accepted this decision

because, in his judgment, the claim area was essentially homogeneous. (RT 1822)[1] Mr. Schroter repeatedly so testified at the agency hearing. (RAH 236, 238, 239) Most importantly, Mr. Schroter never conceded, throughout his lengthy examination as an adverse witness, that his samples were nonrepresentative of material on the claims, or that his sampling technique was deficient in any way.

At pp. 11-12 of the petition, Doria falsely asserts the Caltrans lab "illegally" altered its procedure by "destroying" the reverse side of the original test sheets. Messrs. Rundle, Pitts and St. Claire testified that the lab policy was to retain original test sheets for about one year before the sheets were discarded. (RT 330, 331, 733, 964, 968) The district court correctly found there was no sinister or ulterior motive in adhering to the longstanding policy. (Pet. Appen. "D," p. 44a) Assuming a one year retention, the original test sheets were in existence and available during the six day agency hearing in April and May 1973.

In its attempt to prove a sinister scheme in the destruction schedule, Doria has appended a documents retention schedule of the California Department of Transportation dated eight years after the year in question. (Pet. Appen. "C") This document was clearly irrelevant to the year in issue. No retention schedule for the year 1972 applicable to the Caltrans lab in District 8 could be found. Doria offered the 1980 retention schedule and the testimony of Ms. Haglund purportedly to impeach Mr. Pitts, the lab supervisor. However, Ms. Haglund testified that the retention schedule for lab test sheets was five years for the *Headquarters* lab and that this schedule was *not* uniform throughout the districts statewide, and that Headquarters never directed that its re-

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[1]The following abbreviations will be used for references to the record below: "RT" for Reporter's Transcript; "RAH" for the agency hearing.

tention schedule be made uniform for other labs. (RT 1089-90) Further, the category of "work cards and Test Reports" (Item No. 8 of the schedule) clearly refers to "Headquarters" policy. The allegedly spurious insertion after Item No. 4 "includes work cards and tests" was intended to clarify the district policy. But counsel for Doria never sought to elicit from Mr. Vidor *who* made the insertion or *why* it was made. So much for the "perfidy" of counsel.

Regarding the Caltrans lab test procedure challenged by Doria, no witness from the lab testified it was "illegal" to composite material from a homogeneous area. No witness from the lab testified that the weights of Doria claim specimens which were tested were inadequate or that the testing was not in compliance with test methods promulgated by Caltrans. Mr. St. Claire, the tester, could not recall the numbers of samples or how many groups of samples were composited from the claims, nor could he be certain of this information from merely reviewing the test sheets. (RT 1724, 1728-29) However, it was clear that in his opinion the test results accurately showed the quality of the material. (RT 1749)

ARGUMENT.

I.

The District Court Found No Fraud and Its Findings Are Not Clearly Erroneous.

It should be apparent that Doria's compressed and selective version of testimony which lasted 20 court days is merely an attempt to reargue the merits. Doria's so-called charge of "fraud" was thoroughly ventilated in the district court. As the Ninth Circuit aptly noted after its review of the voluminous record, "The district court was more than patient in allowing Doria to put on its case. . . ." (Pet. Appen. "A," p. 3a) All the evidence elicited by Doria during twenty days of trial, was considered and weighed by the district court, after respondents jointly moved for dismissal under Rule 41(b) *F.R. Civ. Proc.* As the Findings show, Doria failed to prove that any fraud was practiced on the agency tribunal. (Pet. Appen. "D," pp. 31a-57a) From the detailed Findings, the district court concluded:

> "5. The Court finds and concludes that there was no intentionally false and misleading material evidence adduced by the defendants-contestants in the administrative proceedings and no fraud, *either extrinsic or intrinsic*, on the ALJ and the IBLA." (Pet. Appen. "D," p. 59a) (Emphasis added.)

The Ninth Circuit held that the district court was not clearly erroneous in its decision. This Court has frequently stated that the authority of an appellate court in reviewing findings is circumscribed by the deference it must give to decisions of the trier of fact who is usually in a superior position to appraise and weigh the evidence. *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100, 122, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129 (1968).

II.

This Is Not a Case of "Fraud on the Court".

In the face of findings of the District Court regarding the fraud issue, Doria asserts this case is of "such fabric of fraud" as was considered by this Court in *Hazel-Atlas Company v. Hartford Co.*, 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944). Doria also relies on language in the cases of *Communist Party v. Subversive Activities Control Bd.*, 351 U.S. 115, 76 S.Ct. 663, 100 L.Ed. 1003 (1956) and *United States v. Shotwell Mfg.*, 355 U.S. 233, 78 S.Ct. 245, 2 L.Ed.2d 234 (1957). Doria also cites the commentary in 7 Moore, Federal Practice ¶ 60.37, which concerns the type of fraud supporting an independent action in equity to set aside a judgment.

Doria's argument regarding the importance of this case assumes that Doria proved the very facts which were decided adversely to it by the District Court. Respondents submit this is not a case of a deliberate, calculated plan to deceive a tribunal, such as the spurious article involved in *Hazel-Atlas*, or the newly discovered evidence upon which the government sought a remand in *Shotwell*. Rather, the genesis of this case was a mining contest — an adversary proceeding — before the ALJ in which both sides produced expert witnesses and in which considerable documentary evidence was presented pro and con on the issue of mineral validity of the Doria Mining claims. Doria focuses its claim of fraud essentially on one item of evidence, Exhibit 14A in the contest hearing. (Pet. Appen. "G," pp. 89a-93a) This exhibit was but one of thirty-nine exhibits introduced by contestants which included numerous photos, maps and assay sheets. Despite the voluminous evidence, Doria asserts that the laboratory test sheets which were not part of the Schroter mineral report, were somehow deliberately withheld. Doria asserts the testing was "blatantly improper

and illegal." Ignored, however, is the fact that despite the presence in evidence of Exhibit 14A, the administrative record reveals absolutely no cross-examination by Doria on the specifics of Schroter's sampling and testing procedure. See Findings No. 32 and 33, Petition Appen. "D," pp. 46a, 47a. This was an area open to inquiry — if counsel were interested — since Exhibit 14A clearly indicated the sand and gravel tests were run by the State materials laboratory, and that in the course thereof compositing was employed. Thus, while respondents deny the sampling and testing was improper, this is hardly a case of a wilful and deliberately planned imposture by Respondents such as was involved in *Hazel-Atlas* above.

Nor is this a case of admitted perjury or other tainted testimony as was involved in *Communist Party v. Subversive Activities Control Bd.* and *U.S. v. Shotwell, supra.* In both of these cases the purpose of the remand by this Court was to make certain that the lower tribunals based their findings on reliable evidence and to determine where the truth lay. Similarly, the purpose of the remand in *Doria I* was to give Doria an opportunity to prove its claim of fraud. Doria failed to sustain its burden, and on the record herein the case at bench cannot rationally be analogized to the facts in the *Communist Party* and *Shotwell* cases, *supra.* Doria strains logic and credulity in its attempt to do so.

Nor is this case of the same genre as *Bulloch v. United States,* 95 FRD 123 (DC Utah). In *Bulloch* the trial court made findings on numerous instances of the conduct of government agents acting in the course of their employment which was intentionally false or deceptive, and concluded that relief should be granted based on said findings. (*Id.* 95 FRD at 144) In the case at bench, of course, no such findings were made or could have been made. Doria can derive no support from *Bulloch.*

In this case as in *Wilkin v. Sunbeam Corp.* (10th Cir. 1972) 466 F.2d 714, we are concerned with documents, some of which the trial court deemed relevant and some irrelevant, and with credibility questions which the trier of fact has determined adversely to petitioner Doria. Respondents submit that the following concluding language in *Wilkin* is most applicable to Doria's case as it proceeded through all the levels of review herein:

> "Plaintiff has come forward with no new evidence which would change that holding. She has not sustained the burden of establishing fraud. Nothing which she has presented shows a defilement of the judicial process. The trial court patiently heard everything which she had to offer and with untiring industry analyzed her many claims. The denial of Rule 60(b) relief was not an abuse of discretion. On the record presented we are unable to see how the trial court could have reached any other result." (*Id.* 466 F2d at 717)

Conclusion.

Doria has had its day in court. The IBLA in its comprehensive opinion reviewing the evidence adduced on both sides, concluded there was no showing of mineral validity on the subject mining claims. The District Court, after remand, patiently heard Doria's protracted and largely irrelevant case of fraud, and found, also on substantial evidence, that no fraud existed in the agency proceedings. The Ninth

Circuit in *Doria II* affirmed. Doria has set forth no reasons for intervention by this court and respondents submit the writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX I.

Decision.

State of California, et al., v. Doria Mining and Engineering Corporation, et al., United States, Intervenor.

IBLA 74-192 Decided October 31, 1974

Appeal from decision of Administrative Law Judge Graydon E. Holt (California Contest No. R-4873) declaring mining claims null and void.

Affirmed.

1. Mining Claims: Contests — Rules of Practice: Private Contests — Rights-of-Way: Generally — Special Use Permits

   The holders of special use permits and easements granting rights-of-way across mining claims have a sufficient adverse interest under 43 CFR 4.450-1 to initiate a private contest against mining claimants challenging the validity of the claims.

2. Administrative Practice — Administrative Procedure: Generally — Mining Claims: Contests — Rules of Practice: Private Contests — Intervention

   The United States Department of Agriculture may intervene in a private contest in the capacity of a contestant when the contest was initiated to ascertain the validity of mining claims situated in a national forest. The Government intervenor may be represented by counsel employed by the Department of Agriculture acting on behalf of the Forest Service and may attack the validity of the mining claims on the grounds disclosed by the private contestants' complaint.

3. Administrative Procedure: Adjudication — Contests and Protests: Generally — Mining Claims: Contests — Mining Claims: Determination of Validity — Rules of Practice: Private Contests

   A contest proceeding initiated to determine the validity of mining claims does not represent an unconstitutional administrative taking or condemnation of private property. This is true whether the determination of validity is made in a proceeding initiated by the Government or by private parties, for in either case the adjudication is made not by the party who initiated the proceeding but by the Department of the Interior, which has the authority, after proper notice and upon adequate hearing, to determine the validity of unpatented mining claims.

4. Mining Claims: Common Varieties of Minerals: Generally — Mining Claims: Discovery: Marketability

   In order to demonstrate a discovery on a placer mining claim located for a common variety of sand and gravel before July 23, 1955, it must be shown that the material could have been extracted, removed and marketed at a profit as of July 23, 1955.

5. Mining Claims: Determination of Validity — Mining Claims: Discovery: Generally

   Where contestees are seeking to validate a group of claims, they must prove that a valuable mineral deposit exists on each claim. A showing that all the claims taken as a group satisfy the requirements of discovery is not sufficient.

6. Mining Claims: Discovery: Generally

   Evidence of mineralization which might warrant further exploration work within a claim rather than development of a mine is not sufficient to constitute a discovery of a valuable mineral deposit.

7. Mining Claims: Discovery: Generally

   There has not been a discovery of feldspathic sands suitable for use in making glass where, although such mineral has been found with the limits of a claim, the evidence is not of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine.

8. Mining Claims: Common Varieties of Minerals: Generally — Mining Claims: Discovery: Marketability

   Where the preponderance of the evidence in a contest hearing does not show the existence of a reasonably continuous profitable market for a common variety of sand and gravel from a mining claim, from 1955 to the time of the hearing, the claimants have failed to show a discovery.

APPEARANCES: Joseph A. Montoya, Esq., Robert L. Meyer, Esq.. Hugh R. Williams, Esq., and Robert W. Vidor, Esq., Legal Division, Department of Public Works, Los Angeles,[1] for appellee State of California; David G. Moore, Esq., Reid, Babbage & Coil, Riverside, California, for appellee Calnev Pipe Line Company; Milnor E. Gleaves, Esq., Los Angeles, California, for the appellants; Charles F. Lawrence, Esq., Office of the General Counsel, Department of Agriculture, San Francisco, California, for the United States, Intervenor.

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[1]On June 25, 1973, the parties were given notice that pursuant to CAL. GOV'T CODE § 14008, the Department of Transportation succeeded to all the duties, powers, purposes, responsibilities and jurisdiction of the Department of Public Works, State of California, effective July 1, 1973, and effective that date assumed the position of said Department of Public Works as contestant in these proceedings. Counsel of record remained the same.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Doria Mining and Engineering Corporation, Richard H. Hutchinson, J. J. Schwietert and E. May Schwietert have appealed from a decision by Administrative Law Judge Graydon E. Holt, dated December 26, 1973, declaring appellants' eighteen 40-acre association placer mining claims null and void.

Appellants' mining claims were located between March 1, 1953, and July 22, 1955.[2] The claims are situated in Cajon Pass approximately halfway between Victorville and San Bernardino, and lie within the San Bernardino National Forest in secs. 14 and 23, T. 3 N., R. 6 W., S.B.M., California.

Appellee State of California claims an interest in sections 14 and 23 by virtue of a Highway Easement Deed issued by the United States on September 26, 1968.[3] Between 1968 and 1970, the State entered upon portions of sections 14 and 23 and constructed a highway commonly known as Interstate 15. This highway crosses over some of appellants' mining claims. The State's easement is subject to:

> (1) Outstanding valid claims, if any, existing on the date of this grant, and the Grantee shall obtain such permission as may be necessary on account of any such claims. [Ex. 1]

Appellee Calnev Pipe Line Company is a corporation engaged in the construction, maintenance and operation of pipeline systems for the purpose of transporting liquids. On January 1, 1961, and March 27, 1970, the United States

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[2]See Appendix A.

[3]The right-of-way was granted by the Department of Transportation under the authority of the Federal Aid Highway Act of August 27, 1958, *as amended*, 23 U.S.C. § 107(d) (1970). The Department of Agriculture, acting by and through the Forest Service, agreed to the transfer of the easement through the San Bernardino National Forest.

Department of Agriculture, Forest Service, issued Special Use Permits to Calnev for the construction of pipelines across portions of sections 14 and 23. In 1961, Calnev entered upon these sections and constructed a high pressure pipeline. In 1970, Calnev again entered the area and constructed another high pressure pipeline. The pipelines cross over portions of appellants' mining claims. Calnev's permits were "subject to all valid claims" (Exs. 2a, 2b).

On December 30, 1970, and January 5, 1971, appellants filed in the Superior Court of San Bernardino County complaints in inverse condemnation and trespass against Calnev and the State of California. In their complaints appellants alleged: (a) ownership of the 18 unpatented placer mining claims; (b) that Calnev and the State, in construction of the above-mentioned improvements, entered upon and took permanent possession of portions of land covered by the mining claims without permission and authority of appellants; (c) that the lands embraced within said mining claims contain valuable deposits of sand, gravel and precious metals; (d) that by reason of the construction and maintenance of the improvements, extraction of sand, gravel and precious metals within the area of the Easement Deed and Special Use Permits has been rendered impossible; and (e) extraction of minerals has been rendered practically and economically unfeasible upon remaining portions of the mining claims. Appellants prayed for damages against Calnev and the State in excess of $15,000,000.

On July 20, 1972, appellees initiated a private contest against appellants pursuant to 43 CFR 4.450. Appellees claimed that by virtue of the easement and permits noted above they were competing users, and claimed an interest adverse to appellants' interests in the lands embraced within the mining claims. Their complaint maintained that appellants' mining claims were invalid for the following reasons:

(a) There is not disclosed within the boundaries of said mining claims, and each of them, mineral materials of a variety subject to the mining laws sufficient in quantity, quality and value to constitute a discovery;

(b) The materials found within said mining claims, and each of them, could not have been mined, removed and marketed at a profit prior to the Act of July 23, 1955; and

(c) The land embraced within said mining claims, and each of them, is non-mineral in character.

Appellants filed an answer to the complaint stating that the 18 placer mining claims were valid. Appellants also filed a motion to dismiss the contest alleging that the contestants lacked standing to bring the action under the private contest provision cited above because neither the easement nor the permits created an interest "adverse" to the interests of the contestees. Judge Holt denied appellants' motion to dismiss.

On January 15, 1973, Charles F. Lawrence, Esq., Office of the General Counsel, United States Department of Agriculture, filed a notice of appearance on behalf of the United States requesting the right to intervene in the capacity of a contestant. The request was based on the Forest Service's determination that the proceedings directly concerned the status of land comprising a portion of the San Bernardino National Forest. Judge Holt granted the motion for intervention. Appellants' motion to set aside the order allowing intervention by the United States was denied. Thereafter, a hearing was held in Los Angeles, California, beginning on April 26, 1973.

The issues at the hearing narrowed to the questions of (a) whether there was a discovery of a valuable sand and gravel deposit on each claim as of July 23, 1955, and without substantial interruption up to the time of the hearing, and

(b) whether there was a discovery of a valuable deposit of feldspathic sand usable for glass manufacturing as of the time of the hearing.[4] Based on the evidence presented at the hearing, the Administrative Law Judge found that such discoveries did not exist and concluded that all 18 placer mining claims were therefore invalid. Accordingly, he declared them null and void.

On appeal, appellants press the following arguments:

1) The contestants have no property interest adverse to the contestees', which adverse interest is a prerequisite to standing to initiate a private contest; the contestants only have a license from the United States to cross national forest land, subject to existing rights. Also, by way of preface, appellants reassert their objection to the entry by the United States as intervenor in these proceedings.

2) The rights of the contestees in each claim are private property rights of which they may not constitutionally be deprived by other private parties in an administrative proceeding.

3) The Administrative Law Judge erroneously assumed that the contestees in a private contest have the burden of proving the validity of their claims.

4) The contestants failed to establish by a preponderance of the evidence that the claims are invalid.

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[4]The Judge did not make any determination regarding the charge that the land was nonmineral in character. In his decision, at 2, he had the following to say:

> If there has been a discovery of a valuable mineral deposit, the land must necessarily be mineral in character. If there has not been such a discovery on a claim, the claim is void. Although each 10-acre subdivision must be mineral in character, the determination in this case will be based on the question of discovery not on the mineral character of the land. Accordingly, the third charge is dismissed.

5) The Administrative Law Judge improperly denied the contestees' motion to reopen the hearing for the receipt of further evidence.

In their initial argument on appeal, appellants maintain that the contestants' easement and special use permits are not interests "adverse" to the interests of appellants within the meaning of 43 CFR 4.450-1. Accordingly, they argue that the contestants lack standing to initiate a private contest. We do not agree. 43 CFR 4.450-1 reads as follows:

> *By whom private contest may be initiated.* Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land or who seeks to acquire a preference right pursuant to the act of May 14, 1880, as amended (43 U.S.C. 185), or the act of March 3, 1891 (43 U.S.C. 329), may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management. Such a proceeding will constitute a private contest and will be governed by the regulations herein.

In *Duguid v. Best*, 291 F.2d 235 (9th Cir. 1961), *cert. denied*, 372 U.S. 906 (1963), the Court of Appeals held that pursuant to the above regulation[5] the holder of a special use permit granted by the Forest Service, Department of Agriculture, which permitted construction of a dam and spillway on national forest land, could initiate a private contest to determine the validity of a mining claim in conflict

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[5]With minor variation, the regulation was at that time codified at 43 CFR 221.51.

with the special use permit.[6] The facts in that case are strikingly similar to the situation presented in this proceeding. In *Duguid*, the Paradise Irrigation District was granted a permit "subject to all valid claims." Subsequent to the grant of the permit, the District, without the consent of the mining claimants, took possession of a portion of the mining claim and proceeded to construct a dam and spillway thereon. The claimants then instituted an action against the District in the Superior Court of the State of California alleging unlawful taking of private property. Thereafter the District filed in the California Land Office, Bureau of Land Management, a complaint against the mining claimants as a private contest seeking an adjudication by the Bureau of the validity of the mining claim. The District's complaint alleged that its special use permit entitled it to use the lands specified in its permit, that the mining claimants were asserting an adverse claim, and that the lands within the mining claim were nonmineral in character and contained minerals insufficient to constitute a discovery. The Court of Appeals held that under such circumstances the initiation of a private contest by the District was proper.

[1] A similar conflict of interest exists in the present proceeding. To the extent that a multi-lane, major freeway and high-pressure pipelines cannot co-exist with the mining of sand and gravel and other minerals on the subject claims,

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[6] *See also Thomas v. DeVilbiss*, 10 IBLA 56, 57 (1973), holding that the owner of a grazing lease under section 15 of the Taylor Grazing Act of 1934, *as amended*, 43 U.S.C. § 315 (1970), had a sufficient adverse interest under 43 CFR 4.450-1 to initiate a contest against a mining claimant alleging lack of discovery of valuable minerals; and *Sedgwick v. Callahan*, 9 IBLA 216, 223 (1973), holding that surface patentees under the Stock-Raising Homestead Act of 1916, *as amended*, 43 U.S.C. § 291 *et seq.* (1970), had an adverse interest sufficient to bring a private contest against mining claimants. *See also United States v. Howard*, 15 IBLA 139 (1974); *City of Phoenix v. Reeves*, 14 IBLA 315, 81 I.D. 65 (1974).

the interests of the State and Calnev are clearly "adverse" to the interests of the appellants within the meaning of 43 CFR 4.450-1.[7] Appellees are entitled to bring an action in the Department to determine whether discoveries have been perfected on appellants' unpatented mining claims so that appellees may know the proper course to follow in protecting their interests in the land. Accordingly, we conclude that the appellees have standing to bring this private contest.

[2] Appellants further object to the United States Department of Agriculture intervening in the contest in the capacity of a contestant. Intervention was clearly proper as the Department of Agriculture was a party whose interests were affected by the proceedings. *See United States v. McCall*, 2 IBLA 64, 75, 78 I.D. 71 (1971). When lands within national forests are not valuable for their mineral deposits, the Forest Service is entitled to the free and unrestricted possession and control of the lands in order to properly administer them as the law directs. Accordingly, if the Department of Agriculture determines that it has an

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[7]The record indicates that in 1960 appellant J. J. Schwietert, then owner of all 18 claims, executed a waiver of rights to surface use thereof (Exs. C, D, E) under the provisions of section 6 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 614 (1970). By such voluntary relinquishment, Mr. Schwietert gave the United States the right to manage and dispose of the vegetative surface resources on the claims and to manage other surface resources thereof. But as correctly pointed out by appellants, section 4 of the Act, 30 U.S.C. § 612 (1970), provides that,

> any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto * * *.

Section 6 further provides that,

> no such waiver or relinquishment shall be deemed in any manner to constitute any concession as to the date of priority of rights under said mining claim or as to the validity thereof.

Thus, the relinquishment of surface use under this Act has not removed the conflict between the parties.

administrative need to ascertain its right to certain lands upon which mining claims are located, then it is entitled to have that right adjudicated, and that duty devolves upon this Department. *United States v. Bergdal*, 74 I.D. 245, 252 (1967); *H. H. Yard*, 38 L.D. 59, 66-67 (1909). The purpose of this private contest was to ascertain the validity of mining claims lying in a national forest. The initiation of such a proceeding could have been recommended by the Forest Service pursuant to the Memorandum of Understanding executed by the Bureau of Land Management and the Forest Service, effective May 3, 1957. VI BLM Manual 3.1 (June 21, 1962). Had such a separate proceeding been brought, it could have been consolidated with the private contest. *Marvel Mining Co. v. Sinclair Oil and Gas Co., United States v. Marvel Mining Co.*, 75 I.D. 407, 410 (1968). Whether done by consolidated proceedings or by intervention, the substance of the action is the same. Furthermore, the Government intervenor may attack the validity of the mining claims on the grounds disclosed by the private contestants' complaint. *Jebson v. Spencer*, 61 I.D. 157, 169 (1953). It was also proper for the Government to be represented by counsel employed by the Department of Agriculture acting on behalf of the Forest Service. *United States v. Ramsher Mining and Engineering Co.*, 14 IBLA 32, 36 (1973). *See also* 43 CFR 1862.4.

[3] Appellants' second allegation of error is also without merit. If an unpatented mining claim is invalid, compensation is not required because "no right arises from an invalid claim of any kind," and thus nothing is taken from the claimant. *Cameron v. United States*, 252 U.S. 450, 459-60 (1920). This is true whether the determination of invalidity is made in a proceeding initiated by the Government or by a private party. In either case the adjudication is made not by the party who initiates the proceedings, but by au-

thorized representatives of the Department of the Interior. *See Duguid v. Best, supra* at 241. It has been argued before that such validity proceedings are unconstitutional administrative takings or condemnations of private property. The courts, however, have recognized that the Department of the Interior has plenary power in the administration of public lands, and as part of that power the Department has the authority, after proper notice and upon adequate hearing, to determine the validity of unpatented mining claims. *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963); *Cameron v. United States, supra; Converse v. Udall*, 399 F.2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969); *Davis v. Nelson*, 329 F.2d 840 (9th Cir. 1964). *See also United States v. Howard*, 15 IBLA 139, 143 (1974); *United States v. Northwest Mine & Milling, Inc.*, 11 IBLA 271, 272-73 (1973); *United States v. Dummar*, 9 IBLA 308, 309 (1973).

In their third and fourth arguments, appellants generally maintain that the Administrative Law Judge's decision was incorrect as it was based on the improper assumption that the contestees had the burden of proving the validity of their claims. Appellants argue that the contestants were required and failed to prove by a preponderance of the evidence that the claims were invalid.

We note that while in a private contest the party bringing the action generally has the burden of preponderating on the disputed issue, *Marvel Mining Co. v. Sinclair Oil and Gas Co., supra* at 423, when the Government intervenes as a contestant the proceeding then becomes analogous to any other government contest where we have held that the contestant need only show a prima facie case of invalidity. The burden then shifts to the mining claimant to show by a preponderance of the evidence that the claims are valid. *United States v. Clear Gravel Enterprises, Inc.*, 2 IBLA

285, 301 (1971); *see Foster v. Seaton*, 271 F.2d 836, 838 (D.C. Cir. 1959).

In any case, the issue is without consequence because regardless of which party the Judge placed the burden of proof upon, the evidence presented by the private contestants clearly established the invalidity of the subject mining claims. The thrust of contestants' evidence wholly negated the existence of a discovery on any of the claims. Thus, we find that the Judge's conclusion that the claims are invalid is supported by a preponderance of the evidence in the record. As the appellants essentially contend that the Judge's decision is contrary to the evidence, we shall set forth the salient points adduced at the hearing.

The contestants' first witness was Austin Schroter, a consulting geologist and mining engineer with 35 years of experience in various positions in the mining industry (Tr. 76). Mr. Schroter made a mineral evaluation study of the claims to see if there were valuable minerals of any kind. During his examination he was aided by Dr. Robin Willis, an engineering and petroleum geologist, T. A. DeVore, a metallurgical engineer, Charles A. Lee, a geologist, John F. Schroter, an engineering technician, and Frank Nevin, an engineering geologist (Tr. 98).

In the spring of 1972, Schroter and his aides undertook a sampling program on each of the claims (Tr. 124-25). Samples were taken from each claim at an average depth of 10 to 12 feet. Each sample was then coned, quartered down and split into four sections. One quarter was screened and weighed on the ground to determine the sand to gravel ratio, a second quarter was submitted for laboratory analysis, the third quarter was retained for examination for precious metal content, and the last quarter was reserved for examination by interested parties, such as the contestees (Tr. 127).

In a laboratory analysis, Schroter tested the samples from the claims to determine their sand to gravel ratios, their resistance to abrasion (L. A. Rattler Test), and their sand and silt content (Sand Equivalent Test) (Tr. 135-36). The test results indicated that the material on the claims did not meet minimum specifications required for commercial aggregate in the industry as of July 23, 1955, or for any period thereafter (Tr. 135, 142, 147, Ex. 14a).

In addition to the sand and gravel study, the claims were examined for precious metals. Samples from each of the claims were panned to a concentrate and no gold or silver was observed in particulate form (Tr. 147-48). The samples were also subjected to fire assay (Exs. 15a, 15b, 15c) and again the quality of gold and silver did not approach commercial significance on any of the claims (Tr. 153, 264). Assays for precious metals were performed both by Mr. DeVore and by the Union Assay Office of Salt Lake City, Utah (Tr. 151, Exs. 14b, 14c, 14d). No metals of any value were found. Schroter testified that the claims were examined for any type of commercial mineral whatsoever: oil, gas, gold, silver, platinum, industrial minerals, feldspar, orlithium, zirconium, vanadium, etc., "any commercial mineral whatever, we looked for," (Tr. 222), but nothing of commercial value was discovered.

In addition to the mineral examination, Schroter did an extensive sand and gravel marketing study. He determined that the relevant trade territory extended to San Bernardino, 20 miles to the south, and Victorville, 20 miles to the north (Tr. 200-01). Schroter interviewed sand and gravel producers who were supplying this area and acquired information regarding the quality and quantity of the materials they produced both at the present time and at the time that common varieties of sand and gravel were withdrawn from location. He also received information regarding haulage

rates, market prices, costs of production and the extent of demand for sand and gravel in the trade territory (Tr. 205-07).

Schroter determined from his investigation that except for State highway projects underway during 1953-55 and 1968-70, there were no major public projects under construction requiring significant amounts of aggregate within a reasonable distance from the subject claims (Tr. 221). During the periods of limited demand when no State highway construction occurred, local producers in San Bernardino and Victorville were supplying high quality sand and gravel for use in residential construction, streets and highways, manufacture of sewer pipe, manufacture of ready-mix concrete, and manufacture of transit mix concrete (Tr. 221).

The evidence presented at the hearing was *inclusive* regarding whether material from the subject claims was suitable for use in the construction of the State highways. Schroter testified that he examined State highway records which indicated that the material in sections 14 and 23 was unsuitable for use as mineral aggregates for road construction (Tr. 161). The State records indicate that land outside of the area of the claims, in sections 13 and 23, was used as a borrow pit for embankment material and for other low-grade material requirements (Tr. 196-97). The appellants argued that the material on the claims was suitable for highway construction as the State had waived its specification requirements when marginal quality material was in close proximity to the highway project (Tr. 1223).

In summary, Schroter determined that the sand to gravel ratio on the claims was not in proper balance and was below minimum standards for commercial grade aggregate, the claims were at a mileage disadvantage compared to established commercial producers both in San Bernardino and Victorville, there was no proven use or production record

for the materials on the claims, the established producers were adequately supplying the needs of the relevant market area with better quality material, and no other valuable minerals existed on the claims which could be produced at a profit (Tr. 224-26). Based on an analysis of the foregoing factors, Schroter concluded that the deposits on the subject claims as of July 23, 1955, and up until the time of the hearing, could not have been mined, processed, removed and sold at a profit in a sand and gravel operation alone, or in a sand and gravel operation combined with production of a valuable mineral byproduct (Tr. 225, 226, 231, 1267).

Contestants' second witness was George Thwing, Jr. Mr. Thwing received a degree in civil engineering in 1928, and worked in the mining industry until 1938 when he went into the sand and gravel business. He operated the Triangle Rock and Gravel Company in San Bernardino, which produced sand and gravel and ready-mix material (Tr. 324-25). In 1973 he retired from the company and is currently operating as a business consultant. He was retained by the contestants to make a study of and form an opinion on the probability of developing a profitable sand and gravel operation from the lands covered by the subject claims as of July 23, 1955 (Tr. 328). He examined Schroter's test results, investigated the quality of and supply and demand for sand and gravel in the market area, haulage rates, availability of water for processing, specifications for commercial aggregate, quality and quantity of material on the claims, and concluded that it would not have been feasible to put a commercial plant on the site and operate in the market that was existing in 1955, or thereafter (Tr. 330, 345-46, 362). He determined that the only possible use for the material on the claims would be for lowgrade fill material (Tr. 380).

Contestants' final two witnesses were Edward J. Curtin and Robert E. Hove. Mr. Curtin has been in the sand and

gravel business for 18 years and is presently employed as manager of technical services for Owl Rock Products Company. Prior to this job he was employed by Owl Service Rock Company in San Bernardino (Tr. 441-42). Curtin testified that contestee Richard Hutchinson approached Owl Service Rock Company in 1967 with an offer to use the sand and gravel on the subject claims for construction of aggregates to be used in connection with the upcoming bids for the Interstate 15 highway project (Tr. 445). Owl sampled the area and then entered into an option agreement which for $1,000 granted the right to remove 500,000 tons of material at a rate of 9¢ per ton for the first 100,000 tons, and 8¢ per ton thereafter (Tr. 450). Owl solicited all the general contractors who were bidding on the job but was unsuccessful in securing a contract. Curtin testified that Owl was not interested in the material for anything other than the highway project, and thus chose not to exercise the option (Tr. 457). He also expressed the view that based on his experience in the industry, a commercial aggregate operation could not have been installed within the area of the subject claims as the quality of the material was poor and the market was adequately covered by other producers (Tr. 457-58).

Mr. Hove is the owner-operator of a ready-mix concrete and aggregate plant, Hi-Grade Materials Company, in Lucerne, California. He has been in operation since 1955 and Victorville is part of his marketing area (Tr. 472-73). He testified that in 1969 he was approached by contestee Hutchinson regarding development of aggregates on the subject claims. He sampled the area and had the samples sent to the CHJ Materials Laboratory, Inc., San Bernardino, for testing (Tr. 478). The test results indicated that the quality of the material was too poor for commercial production, and accordingly no agreement was executed (Tr. 482, Ex.

25).

For the appellants, both contestee Hutchinson and J. J. Schwietert testified that in their opinion the subject claims could be commercially exploited (Tr. 556-76, 1180-88). Schwietert testified that for a period of ten years he had been stockpiling material from the claims for the purpose of seeing what materials were on the claims and to sell such material if he could find a willing buyer (Tr. 570-72). He never analyzed the quality of the material nor did he sell any of it, but he stated that the gave it away to friends for use as foundation material (Tr. 576). James Maxwell Muir, Jr., President of King Solomon Mining Corp., testified that in his opinion it would have been commercially feasible in 1955 to install a $1,200,000 mill producing 600 tons per day of aggregate material (Tr. 1061-65). He offered no market or cost analyses to justify why such a project would have been commercially feasible.

Shortly before the hearing, the Hazen Research Company, Golden, Colorado, a mining exploration and consulting organization, was retained by the contestees to investigate the claims to determine what minerals could be produced. The conclusion of the Hazen Report (Ex. B) is that sand and gravel on the claims can be used in aggregates and that feldspathic sand in the fines can be used in the manufacturing of glass. The Hazen Report was prepared by William T. Hamling, David D. Billings, and Ralph Paul Meyertons.

Hamling is a mining engineer employed by the Hazen Company. His assignment was simply to take samples from the claims; he did not analyze the material nor did he make any investigation as to its marketability (Tr. 540-41). From two of the claims, the Outlook and Old Sunny, Hamling removed large, 120-gallon samples of material. From the remaining 16 claims he took smaller, 5-gallon samples; in

some instances these latter samples represented 3-foot deep streambed excavations. Hamling testified that the time allotted for sampling was not sufficient to allow drilling a hole on each claim, but he was of the opinion that such drilling was unnecessary as the material in the general area did not appear to vary greatly from one claim to the next (Tr. 530-31).

Billings is a self-employed glass technologist who was called in to work with the Hazen Company to determine if suitable feldspathic sand products could be extracted for use in the glass industry (Tr. 612-20). He examined ¼ pound of material from the large samples (Tr. 760). Based on his examination, he was of the opinion that given a 60% recovery rate from the bank-run material, it would be feasible to produce feldspathic sands for use in the Los Angeles glass industry (Tr. 631-33).

On cross-examination, Billings' opinion as to the commercial feasibility of producing feldspathic sands became fraught with qualifications and contingencies. He noted that he had made no estimate of the cost of setting up a plant (Tr. 652), he had not considered the cost of stripping overburden (Tr. 795), nor the costs of disposing of waste (Tr. 794). He assumed an ample water supply (Tr. 655), and also assumed that the quality of the material did not differ at different depths (Tr. 767). He did not know whether there were ample reserves on the claims (Tr. 647).

He made two very significant qualifications for the purposes of this decision. First, he did not analyze any of the 16 small samples and thus could only speculate and draw inferences as to the feldspathic sand quality on 16 of the claims. In these instances he recommended further sampling and testing to determine the quantity and quality of feldspathic material (Tr. 775). On cross-examination he was asked:

Q. Sir, as a glass technologist, would you consider a mere visual inspection of samples from a potential site sufficient to advise a client whether or not the material would be acceptable as a glass sands component in a glass batch operation?

A. No.

(Tr. 696).

Second, he noted that the relevant glass sand market was being supplied by an operation at Mission Viejo near Capistrano and by an operation at Del Monte, California. The Mission Viejo mine, which at the time of the hearing was shut down for an indefinite period, served approxmattely 75% of the market (Tr. 803), and had estimated reserves for a 50-year period (Tr. 647). Billings testified that given the market situation, a successful glass sands operation was contingent upon getting long-term commitments from potential customers (Tr. 776). He recommended that before investing any money in such an operation, it would be advisable to determine when the Mission Viejo mine was going back into production (Tr. 637), and to have potential customers examine the material on the subject claims to see if it fit their particular needs (Tr. 630, 780). Neither the appellants nor the Hazen Company contacted any producers or users of feldspathic sand to determine whether the products from the subject claims could be marketed. Billings testified that a plant capable of processing 100 tons per day would have cost $250,000 to $350,000 in 1955 (Tr. 662). James Maxwell Muir, Jr. placed the cost of a plant at $2,000 per ton in 1955 and $3,000 per ton in 1973, or $1,200,000 and $1,800,000, respectively, for a 600 ton per day plant (Tr. 1061, 1064). Schroter testified that a 100 ton per day plant producing both sand and gravel and feldspathic sand would cost $850,000 (Tr. 1284).

Meyertons is a mining and metallurgical engineer employed by the Hazen Company (Tr. 816). Meyertons tes-

tified that he visually examined the 16 small samples and was satisfied that the mineral content would be reasonably the same for sample to sample (Tr. 846). He did note, however, that had there been more tim he would have further analyzed the 16 small samples (Tr. 859). Following an initial analysis of the two larger samples, Meyertons decided to abandon the search for gold, silver and other precious metals (Tr. 882), and limit the examination to feldspar products (Tr. 883). Meyertons sent a portion of the large samples to Pacific Materials Laboratory, Inc., Bloomington, California, for an evaluation of the suitability of the material for use as an aggregate (Tr. 829). The test results indicated that the material was of poor quality (Ex. 27).

Meyertons testified that the Hazen Report showed that the feldspathic sand found in the samples tested was of sufficient quality to be used in the glass industry. He noted, however, that the potential inaccuracy in the total feldspar determination could be as much as 20% on the samples tested (Tr. 938), and that additional variances could occur with respect to the 16 untested samples. Accordingly, he recommended additional sampling and testing of the materials on the claims (Tr. 859, 945-46). A flow sheet was developed to show in a preliminary fashion how products could be produced in a sand and gravel and glass sand operation (Tr. 836). The report was in essence a technical feasibility study, not a marketability study.

Appellants' last witness was J. Mark Longfield. Mr. Longfield is a consultant for construction aggregate business and has been involved in the sand and gravel industry since 1964 (Tr. 1219). His opinion was limited to the marketability of sand and gravel only. Longfield viewed the claims and in his opinion the material thereon was "marginal" (Tr. 1222). After studying the relevant market he testified that aside from the highway projects, very little demand existed

in the Victorville area until 1965, and while there was some activity in the Hesperia-Apple Valley area, this was adequately covered by local producers (Tr. 1238). He also testified that appellants could not compete in the San Bernardino area because the rock being supplied there was of superior quality. Based on these factors he concluded that a sand and gravel operation could not have been profitable either in 1955 or at any time up to the hearing (Tr. 1241). He did testify, however, that an operation might be successful if a co-product was produced in conjunction with sand and gravel (Tr. 1241). He was not an expert, however, with regard to the production of feldspathic sand and stated that he had no opinion as to whether in 1955 a sand and gravel and feldspathic sand operation could have produced and sold material at a profit (Tr. 1251).

The basic principles of law applicable to this case are now well established and need no extensive elaboration. For a mining claim to be valid there must be discovered on the claim a valuable mineral deposit. A discovery exists

> * * * where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * *.

Castle v. Womble, 19 L.D. 455, 457 (1894); *United States v. Coleman*, 390 U.S. 559 (1968). This test, the prudent man rule, has been refined to require a showing that the mineral in question can be extracted, removed and presently marketed at a profit, the so-called marketability test. *United States v. Coleman, supra*. This present marketability can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, *bona fides* in development, proximity to market, and the existence of a present demand. The marketability test has been specifically held

to be applicable in determining the validity of sand and gravel claims. *Palmer v. Dredge Corp.*, 398 F.2d 791 (9th Cir. 1968), *cert. denied*, 393 U.S. 1066 (1969); *Foster v. Seaton, supra*.

[4] The parties to this proceeding stipulated that the sand and gravel on the claims was to be treated as a common variety material located prior to the withdrawal of such materials (Tr. 144-45). Since Congress withdrew common varieties of sand and gravel from location under the mining laws on July 23, 1955, 30 U.S.C. § 611 (1970), it is incumbent upon one who located a claim prior to that date for a common variety of sand and gravel to show that all the requirements for a discovery, including a showing that the materials could have been extracted, removed, and marketed at a profit, has been met by that date. *United States v. Barrow*, 404 F.2d 749 (9th Cir. 1968), *cert. denied*, 394 U.S. 974 (1969); *Palmer v. Dredge Corp., supra; United States v. Clear Gravel Enterprises, Inc., supra*. This entails a showing of the market which then existed, the cost of extraction and processing which would have been incurred, the transportation charges which would have been involved, the unit price which then prevailed and the profit which the claimants might have realized if they had elected to proceed at that time. *United States v. Gibbs*, 14 IBLA 382, 391 (1973).

The evidence presented at the hearing clearly established that the sand and gravel on the subject claims was of inferior quality and was not acceptable for the type of work being done in the relevant market from the period 1955 to the hearing. During that period deposits of superior quality were being actively exploited in the area and there was only a limited local demand for sand and gravel. Under such circumstances, no discovery of sand and gravel existed on appellants' claims. *Barrows v. Hickel*, 447 F.2d 80, 83 (9th

Cir. 1971). It is of no consequence that appellant Hutchinson gave material from the claims to his friends at no cost. It has been held that the disposal of substantial quantities of sand and gravel at no profit does not demonstrate the existence of a market for the material which would induce a man of ordinary prudence to expend his means in an attempt to develop a mine on his claims. *Barrows v. Hickel, supra.*

The above finding disposes of the contestees' assertion that the Calnev and State rights-of-way are in derogation of their mining claims. The rights-of-way were granted in 1961, 1968 and 1970. Since the mining claims during those periods (and beyond) were at most valuable only for sand and gravel, the finding that the claims were invalid as sand and gravel claims as of the dates when the rights-of-way issued requires a conclusion that the claims, even if later validated, would be subject to the rights-of-way and not vice versa as the contestees contend.

[5] The land, however, remained open to mineral location subject to the rights-of-way. *See A. W. Schunk*, 16 IBLA 191, 195 (1974); *Solicitor's Opinion*, 67 I.D. 225, 228 (1960). Therefore, we must examine whether a discovery after 1970 validated the claims. The only valuable mineral suggested by the record is the possibility of a discovery of feldspathic sands suitable for making glass. For this purpose we assume that sands suitable for glassmaking are NOT a common variety material. *United States v. Kosanke Sand Corp.*, 12 IBLA 282, 305-08, 80 I.D. 538, 549 (1973); *United States v. Pierce*, 75 I.D. 270, 281 (1968). Two requirements of law dispose of this issue. First, where mining claimants are seeking to validate a group of claims, they must show that a valuable mineral deposit exists on each claim. A showing that all of the claims taken as a group satisfy the requirements of discovery is not sufficient. *United States v. Colonna and Company of Colorado, Inc.*,

14 IBLA 220, 226 (1974); *United States v. Harper*, 8 IBLA 357, 368 (1972). Here, only material from two of the claims was actually analyzed by the Hazen Company. Appellants' experts admitted that variations in the quality and quantity of feldspathic sands could occur on the remaining 16 claims. It is axiomatic, we believe, that prudent men do not invest their money in attempting to develop a mine without some evidence that the mineral which they seek to exploit exists in such quality and quantity as to permit the recovery of their capital outlay with a profit. Accordingly, it was proper to conclude that the 16 unanalyzed claims were not shown to have a discovery of a valuable deposit of feldspathic sands.

[6] Second, the Department recognizes a distinct difference between exploration and discovery under the mining laws. Exploratory work is that which is done prior to discovery in an effort to determine whether the land contains valuable minerals. Where minerals are found, it is often necessary to do further exploratory work to determine whether those minerals have value and, where the minerals are of low value, there must be more exploration work to determine whether those minerals exist in such quantity and quality that there is a reasonable prospect of success in developing a paying mine. Only when the exploratory work shows such a reasonable prospect of success can it be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made. *United States v. Converse*, 72 I.D. 141, 149 (1965), *aff'd, Converse v. Udall*, 399 F.2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969). In this proceeding, all of appellants' experts testified that their examinations were preliminary and that further testing would have to be accomplished before recommending that production occur on any of the claims. Appellants were thus still at the explor-

atory stage. We note again that appellants had not yet reached the stage of developing an analysis of the marketability of the feldspathic sands on the claims. As Administrative Law Judge Hold said in this decision (at 8):

> The Hazen report is based on a chemical analysis of one sample from one claim and a visual examination of samples from each of the other claims. The flow sheet and plan of operation require the utilization of the sand and gravel for all purposes. Since the Department has held that the common variety materials can not be used, it is only the feldspathic sand that is subject to location. There was no evidence that this latter material could be economically utilized by itself and no attempt has been made to determine whether it could compete in the existing market. No prudent man would invest his time and means developing any one of the claims until the technology of processing the feldspathic sand has been completed and a reasonably accurate estimation has been made of the cost of production. Until this has been completed there is no way of determining whether the material could compete in the existing market.

[7] There has not been a discovery of feldspathic sands suitable for use in making glass where, although such mineral has been found within the limits of the claims, the evidence is not of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with the reasonable prospect of success in developing the property. *United States v. Duval*, 1 IBLA 103 (1970), *aff'd Duval v. Morton*, No. 72-2839 (9th Cir. December 19, 1973), *aff'g Duval v. Morton*, 347 F. Supp. 501 (D. Ore. 1972). Accordingly, we conclude that all of

the claims were properly declared null and void.[8]

[8] In their final argument on appeal, appellants charge that the Administrative Law Judge improperly denied their motion to reopen the proceedings for the purpose of introducing new evidence. Appellants allege that they have evidence that will establish the fact that the State of California and its contractors used substantial quantities of sand and gravel from appellants' claims during the course of the construction of the highway projects in 1954-55 and 1968-70. In denying the motion, Judge Holt stated the following:

> In the recent decision of *United States v. A. E. Kottinger, et al.*, 14 IBLA 10 (November 27, 1973), the Board held (syllabus):
>
> > Where the preponderance of the evidence in a contest hearing does not show the existence of a reasonably continuous profitable market for a common variety of sand and gravel from a mining claim, from 1955 to the time of the hearing, the claimants have failed to show at discovery.

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[8] In their brief on appeal, appellants place great reliance on *United States v. Kosanke Sand Corp.*, 3 IBLA 189 (1971), which upheld the validity of claims located for feldspathic sands. That decision was later set aside and remanded by this Board. *United States v. Kosanke Sand Corp.*, 12 IBLA 282, 80 I.D. 535 (1973). The facts in the *Kosanke* proceeding are clearly distinguishable from the ones at hand. In *Kosanke*, the exploration of the claims, technique for processing of the sand, existence of a possible market, suitability of the sand for use in glass-making, all had progressed much further than in this case, yet *Kosanke* was remanded for a hearing to develop further evidence as to the quality and quantity of the silica sand on each claim, the amount of each grade of sand on each claim, the market for each grade, the proposed flotation process for beneficiating the silica sand, and transportation costs. The evidence in this case falls so far short of that offered in *Kosanke* as to leave no doubt that the validity of the claims has not been established.

This ruling was supported by both administrative and judicial decisions.[9]

Under the *Kottinger* decision it was incumbent on the contestees to establish that there was a "reasonably continuous profitable market" for the sand and gravel on the claims for 1955 and 1972. Assuming that there was a profitable market for the sand gravel on one or more of the claims for the periods 1954-1955, and 1968-1970, the gap between 1955 and 1968 is fatal to the contestees' contention of validity.

Accordingly, the motion to reopen the hearing is denied.

For the reasons stated, the Judge was correct in denying appellants' motion.

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[9]In *Kottinger, supra* at 13, we quoted the following from *United States v. Charleston Stone Products*, 9 IBLA 94, 100 (1973):

> [T]he contestee must also establish that in the interval from the date of the withdrawal of common varieties of sand and gravel from mineral location to the date of the contest proceedings a market for the * * * mineral has continued without any prolonged interruption * * *. [I]f the marketability of the common variety mineral for which the claim was located is lost, the validity of the location is similarly lost * * *. *United States v. Estate of Alvis F. Denison*, 76 I.D. 223 (1969); *Mulkern v. Hammit*, 326 F.2d 896 (9th Cir. 1964). [L]ater recovery of a profitable market cannot serve to resuscitate such invalid claims.

Judicial review of the *Charleston* case has been sought, *Charleston Stone Products Co., Inc. v. Morton*, Civil No. LV-2039-BRT, currently pending before the United States District Court for the District of Nevada. *See also United States v. Johnson*, 16 IBLA 234 (1974); *United States v. Winegar*, 16 IBLA 112, 81 I.D. 370 (1974).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is affirmed.

/s/ Martin Ritvo,
Martin Ritvo
Administrative Judge

We Concur:

/s/ Douglas E. Henriques
Douglas E. Henriques
Administrative Judge

/s/ Edward W. Stuebing
Edward W. Stuebing
Administrative Judge

APPENDIX A.

	Name	Date of Location	Legal Description
1)	SAND BANK	March 1, 1953	NW 1/4 of NW 1/4, Sec. 14, T. 3 N., R. 6 W., SBM
2)	HARBOR	March 1, 1953	SW 1/4 of NW 1/4 Sec. 14, T. 3 N., R. 6 W., SBM
3)	MANY STONES	March 1, 1953	NW 1/4 of SW 1/4, Sec. 14, T. 3 N., R. 6 W., SBM
4)	WILD TRAIL	March 1, 1953	SW 1/4 of SW 1/4, Sec. 14, T. 3 N., R. 6 W., SBM
5)	BUCK SHOT	March 1, 1953	NE 1/4 of SW 1/4 Sec. 14, T. 3 N., R. 6 W., SBM
6)	OLD SUNNY	March 1, 1953	SE 1/4 of SW 1/4, Sec. 14, T. 3 N., R. 6 W., SBM
7)	OUTLOOK	January 5, 1955	NE 1/4 of NW 1/4, Sec. 14, T. 3 N., R. 6 W., SBM
8)	DELIGHT	January 5, 1955	NW 1/4 of NE 1/4 Sec. 14, T. 3 N., R. 6 W., SBM
9)	SUNSHINE	January 5, 1955	NE 1/4 of NE 1/4, Sec. 14, T. 3 N., R. 6 W., SBM
10)	BALDY	January 5, 1955	SE 1/4 of NE 1/4, Sec. 14, T. 3 N., R. 6 W., SBM
11)	HAWK	January 5, 1955	SE 1/4 of NE 1/4, Sec. 14, T. 3 N., R. 6 W., SBM
12)	OLD BLISTER	March 1, 1953	NE 1/4 of SE 1/4, Sec. 14, T. 3 N., R. 6 W., SBM
13)	CLEAR VIEW	March 1, 1953	SW 1/4 OF SE 1/4, Sec. 14, T. 3 N., R. 6 W., SBM
14)	BUSTER	March 1, 1953	SE 1/4 of SE 1/4, Sec. 14, T. 3 N., R. 6 W., SBM
15)	LIZARD GULCH	July 12, 1955	NE 1/4 of NW 1/4, Sec. 23, T. 3 N., R. 6 W., SBM
16)	MESQUITE	July 12, 1955	NW 1/4 of NW 1/4, Sec. 23, T. 3 N., R. 6 W., SBM
17)	BARREN	July 12, 1955	SW 1/4 of NW 1/4, Sec. 14, T. 3 N., R. 6 W., SBM
18)	RATTLER	July 12, 1955	SE 1/4 of NW 1/4, Sec. 23, T. 3 N., R. 6 W., SBM